No. 91-1300-CFY
Status: GRANTED

Title: United States, Petitioner
v.
Sharon Dunnigan

Docketed:
February 10, 1992

Court: United States Court of Appeals for the Fourth Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Beveridge,Brent E

Entry	Date	Note	Proceedings and Orders
1	Feb 10 1992	G	Petition for writ of certiorari filed.
2	Mar 18 1992		DISTRIBUTED. April 3, 1992
3	Mar 31 1992	P	Response requested -- WHR. (Due May 1, 1992)
5	May 1 1992	X	Brief of respondent in opposition filed.
4	May 6 1992		REDISTRIBUTED. May 22, 1992
6	May 7 1992	X	Reply brief of petitioner filed.
7	May 26 1992		Petition GRANTED.
			**********
8	Jun 23 1992		Record filed.
		*	Proceedings U.S. Court of Appeals, Fourth Circuit and U.S. District Court, S.West Virginia (box)
9	Jul 8 1992		Joint appendix filed.
10	Jul 10 1992		Brief of petitioner United States filed.
11	Aug 14 1992		Brief of respondent Sharon Dunnigan filed.
12	Aug 17 1992	G	Motion of respondent for leave to proceed further herein in forma pauperis filed.
13	Aug 24 1992	G	Motion of respondent for appointment of counsel filed.
14	Sep 16 1992		Reply brief of petitioner filed.
15	Oct 5 1992		Motion of respondent for leave to proceed further herein in forma pauperis GRANTED.
16	Oct 5 1992		Motion for appointment of counsel GRANTED and it is ordered that Brent E. Beveridge, Esquire, of Fairmont, West Virginia, is appointed to serve as counsel for the respondent in this case.
17	Oct 13 1992		SET FOR ARGUMENT WEDNESDAY, DECEMBER 2, 1992. (3RD CASE)
18	Oct 15 1992		CIRCULATED.
19	Dec 2 1992		ARGUED.

91-1900

No.

Supreme Court, U.S.
FILED
FEB 10 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA, PETITIONER

v.

SHARON DUNNIGAN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether the Constitution prohibits a court from enhancing a defendant's sentence under Sentencing Guidelines § 3C1.1 if the court finds that the defendant committed perjury while testifying at trial.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Sentencing Guideline involved	2
Statement	2
Reasons for granting the petition	8
Conclusion	17
Appendix A	1a
Appendix B	16a
Appendix C	29a
Appendix D	30a

TABLE OF AUTHORITIES

Cases:

Braxton v. *United States*, 111 S. Ct. 1854 (1991)	7
United States v. *Acosta-Cazares*, 878 F.2d 945 (6th Cir.), cert. denied, 493 U.S. 899 (1989)	9
United States v. *Akitoye*, 923 F.2d 221 (1st Cir. 1991)	9
United States v. *Barbosa*, 906 F.2d 1366 (9th Cir.), cert. denied, 111 S. Ct. 394 (1990)	9
United States v. *Bautista-Polanco*, 927 F.2d 14 (1st Cir. 1991)	9
United States v. *Beaulieu*, 900 F.2d 1537 (10th Cir.), cert. denied, 110 S. Ct. 3252 (1990)	9
United States v. *Contreras*, 937 F.2d 1191 (7th Cir. 1991)	9, 13
United States v. *Craigo*, No. 90-5351 (4th Cir. Feb. 3, 1992)	10
United States v. *Grayson*, 438 U.S. 41 (1978)	5, 6, 8, 11, 12
United States v. *Jones*, Nos. 90-3498 *et al.* (7th Cir. Dec. 19, 1991)	9
United States v. *Keys*, 899 F.2d 938 (10th Cir.), cert. denied, 111 S. Ct. 160 (1990)	9
United States v. *Lozoya-Morales*, 931 F.2d 1216 (7th Cir. 1991)	15

Cases—Continued: Page

United States v. *Martinez*, 922 F.d 914 (1st Cir. 1991) 15
United States v. *Matos*, 907 F.2d 274 (2d Cir. 1990) 9
United States v. *Ogbeifun*, 949 F.2d 1013 (8th Cir. 1991) 9
United States v. *O'Meara*, 895 F.2d 1216 (8th Cir.), cert. denied, 111 S. Ct. 352 (1990) 9
United States v. *Wagner*, 884 F.2d 1090 (8th Cir. 1989), cert. denied, 494 U.S. 1088 (1990) 9
United States v. *Wallace*, 904 F.2d 603 (11th Cir. 1990) 9
Williams v. *New York*, 337 U.S. 241 (1949) 10-11

Statutes and rules:

Sentencing Reform Act of 1984:
18 U.S.C. 3551-3742 12
18 U.S.C. 3553(a) (2) (C) 14
18 U.S.C. 3577 (1982) 11
18 U.S.C. 3661 12
28 U.S.C. 991-998 12

United States Sentencing Guidelines:
§ 3C1.1 (Nov. 1989) ..... *passim*
Application Note 1(c) (Nov. 1989) 13
Commentary 6, 13
§ 3C1.1 (Nov. 1991) 2
§ 6A1.3 (Policy Statement) (Nov. 1991) 12
21 U.S.C. 846 2

Miscellaneous:

United States Sentencing Comm'n, *Guidelines Manual* App. C, amendment 347 (Nov. 1991) 13

In the Supreme Court of the United States

OCTOBER TERM, 1991

No.

UNITED STATES OF AMERICA, PETITIONER

v.

SHARON DUNNIGAN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, App., *infra*, 1a-15a, is reported at 944 F.2d 178. The opinion dissenting from the denial of rehearing en banc, App., *infra*, 18a-28a, is reported at 950 F.2d 149.

JURISDICTION

The judgment of the court of appeals was entered on August 30, 1991. A petition for rehearing was denied on November 13, 1991. App., *infra*, 16a-17a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

SENTENCING GUIDELINE INVOLVED

The 1989 version of Sentencing Guidelines § 3C1.1, which applied to respondent's sentencing, provided as follows:

> If the defendant willfully impeded or obstructed, or attempted to impede or obstruct the administration of justice during the investigation or prosecution of the instant offense, increase the offense level by 2 levels.

The current version of Sentencing Guidelines § 3C1.1 provides as follows:

> If the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense, increase the offense level by 2 levels.

STATEMENT

After a jury trial in the United States District Court for the Southern District of West Virginia, respondent was convicted of conspiring to distribute cocaine, in violation of 21 U.S.C. 846. She was sentenced to 51 months' imprisonment, to be followed by a three-year term of supervised release. C.A. App. 338-341. The court of appeals affirmed her conviction, but vacated her sentence and remanded the case for resentencing.

1. Respondent Sharon Dunnigan belonged to an organization headed by Freddie Harris, a cocaine dealer in the Charleston, West Virginia, area. The organization was broken up in the late summer of 1988. Harris and a number of co-conspirators subsequently pleaded guilty to cocaine distribution charges. App. *infra*, 2a.

Respondent was charged with conspiring to distribute cocaine with Harris and others during the summer of 1988. At respondent's trial, Harris and four other former co-conspirators testified against her. The evidence showed the following: Respondent served as Harris's source of cocaine in Cleveland, Ohio. On several occasions during the summer of 1988, she traveled to Cleveland alone, with Harris, and with another co-conspirator to obtain cocaine and other drugs. Respondent was also involved in the testing, preparation, and packaging of cocaine for Harris's organization. She tested and packaged cocaine at her apartment, and she employed her daughter to convert powdered cocaine into the form known as "crack" and to sell it in that form. App., *infra*, 2a-4a; Tr. 6-17, 52-56, 67-68, 81-101, 115-118, 141-142, 152-155, 164-165, 173-177.

Respondent's defense was simple; as the court of appeals put it, she "took the stand and denied everything." App., *infra*, 4a. Respondent testified that she did not buy, sell, or use cocaine and that she did not know anyone in Cleveland who used cocaine. She admitted traveling to Cleveland, but she testified that the purpose of those trips was to visit relatives. *Id.* at 5a. Respondent denied knowing whether anyone had manufactured crack cocaine at her apartment. On cross-examination, the government asked respondent whether she had sold crack to an Edward Dickerson on July 12, 1988, at her apartment. Respondent denied having done so. *Ibid.*; Tr. 188-195, 198-205.

On rebuttal, Edward Dickerson testified that he became an informant in 1988 and that law enforcement officials monitored a drug transaction that he engaged in with respondent in the summer of 1988.

During that transaction, Dickerson stated, he purchased crack cocaine from respondent at her apartment. The officer involved in the investigation corroborated Dickerson's testimony. Another cooperating co-conspirator testified that she also purchased crack cocaine from respondent. She said that she saw respondent give crack and powdered cocaine to respondent's daughter and that respondent's daughter sold crack for respondent. App., *infra*, 5a; Tr. 209-213, 232-235, 241-245. The jury convicted respondent.

2. At sentencing, the district court found that respondent lied when she testified at trial. The court therefore enhanced her offense level by two levels on the ground that, by committing perjury at trial, she had obstructed justice within the meaning of Sentencing Guidelines § 3C1.1. 5/21/90 Tr. 34 (C.A. App. 324).[1] The two-level enhancement increased respondent's offense level from 22 to 24. With a criminal history category of I, respondent was subject to a sentencing range of 51-63 months' imprisonment. The district court sentenced respondent at the bottom of that range.

3. The court of appeals vacated respondent's sentence and remanded for resentencing. App., *infra*,

[1] The district court observed, 5/21/90 Tr. 34 (C.A. App. 324):

> The court finds this defendant was untruthful at trial with respect to material matters in this case. The defendant denied her involvement when it is clear from the evidence in the case as the jury found beyond a reasonable doubt that she was involved in the conspiracy alleged in the indictment, and by virtue of her failure to give truthful testimony on material matters that were designed to substantially affect the outcome of the case, the court concludes that the false testimony at trial warrants an upward adjustment by two levels.

1a-15a. The court acknowledged that every other circuit to consider the issue has upheld the constitutionality of applying the enhancement authorized by Sentencing Guidelines § 3C1.1 to defendants who commit perjury at their trials. The court stated, however, that "[o]ur sense of justice requires us to disagree." App., *infra*, 10a. The court expressed a "fear that this enhancement will become the commonplace punishment for a convicted defendant who has had the audacity to deny the charges against him," because "[n]early all testifying defendants tell a story that, if believed in full, would result in acquittal. The jury's verdict implies a disbelief of some material aspect of the defendant's testimony." *Ibid.* The court was disturbed by the prospect that "testimony by an accused in his own defense, so basic to justice, is deemed to 'obstruct' justice unless the accused convinces the jury." *Ibid.* The court said that many factors, such as the prospect of being impeached with a prior conviction, already discourage defendants from testifying, and the prospect of receiving an "automatic" enhancement under Sentencing Guidelines § 3C1.1 may lead a defendant to believe that testifying is not "worth the risk." App., *infra*, 12a.

The court of appeals recognized that in *United States* v. *Grayson*, 438 U.S. 41 (1978), this Court ruled that a sentencing court may consider the fact that the defendant testified falsely at trial. App., *infra*, 12a. Nonetheless, the court found that *Grayson* did not settle the question of the constitutionality of a "perjury enhancement" under the Sentencing Guidelines. "The most basic difference" between this case and *Grayson*, the court found, "is the stated justification for enhancing sentence." *Ibid.* "The

guidelines deem a denial of guilt on the stand 'obstruction of justice,'" the court stated, whereas *Grayson* allowed the trial courts to consider a defendant's untruthfulness "for the purpose of illuminating his need for rehabilitation and the society's need for protection." *Id.* at 12a-13a (quoting *Grayson*, 438 U.S. at 53). The court further noted that *Grayson* did not require "a sentencing judge to enhance, in some wooden or reflex fashion, the sentences of all defendants whose testimony is deemed false," while the Sentencing Guidelines require just such a "'wooden or reflex' enhancement." App., *infra*, 13a (quoting *Grayson*, 438 U.S. at 55).

The court of appeals found that there are insufficient safeguards in place to prevent Section 3C1.1 from coercing a defendant into remaining silent at trial. In particular, the court believed that the trial judge's decision to enhance the defendant's sentence under Sentencing Guidelines § 3C1.1 is effectively unreviewable on appeal. "[I]n light of the jury's verdict of guilt, the district court's finding will never be 'clearly erroneous' where the verdict is sustainable; if the verdict cannot be supported, the sentencing finding will of course become moot." App., *infra*, 14a. The admonition in the Commentary to Sentencing Guidelines § 3C1.1 that a district court should view the defendant's testimony in the light most favorable to him was also ineffectual, the court believed, because "a defendant's testimony that has been apparently rejected in material respects by a jury will almost always compel a finding of untruthfulness." App., *infra*, 14a. The court therefore concluded that "[t]he rigidity of the guidelines makes the § 3C1.1 enhancement for a disbelieved denial of guilt under oath an intolerable burden on the defendant's right to testify in his own behalf." App., *infra*, 15a.

4. The government sought rehearing en banc, which the court of appeals denied by a 6-6 vote. App., *infra*, 16a-17a. Judge Wilkins filed an opinion dissenting from the denial of rehearing en banc, which was joined by Judges Wilkinson, Niemeyer, and Luttig. *Id.* at 18a-28a. Judge Wilkins noted that "[n]ot only does the panel adopt a position at odds with every circuit that has addressed this question, but it does so on a constitutional basis, thereby preventing the United States Sentencing Commission from using its authority, acknowledged in *Braxton* v. *United States*, [111 S. Ct. 1854, 1857-1858 (1991)], to resolve the conflict." App., *infra*, 19a n.2.

Judge Wilkins explained that because the Sentencing Commission sought to further traditional sentencing goals such as retribution, incapacitation, and deterrence, perjured testimony by the defendant is still an appropriate sentencing consideration, just as it was at the time of *Grayson*. App., *infra*, 21a. In addition, he explained that, contrary to the panel's assumption, Sentencing Guidelines § 3C1.1 "is not to be applied indiscriminately to every defendant who testifies and is ultimately convicted." App., *infra*, 22a. In response to the panel's concern that a defendant whose sentence was enhanced because he committed perjury could not effectively challenge the district court's finding on appeal, Judge Wilkins cited a number of cases in which courts of appeals had reversed what they saw as inappropriate applications of the perjury enhancement. *Id.* at 23a-24a. He added that "not a single appellate court has affirmatively supported the type of automatic, mechanistic enhancement over which the panel expresses its concern." *Id.* at 24a.

Finally, Judge Wilkins found implausible the claim that a defendant would be chilled from testifying by the fear of receiving an enhanced sentence for perjury under Sentencing Guidelines § 3C1.1. To the contrary, Judge Wilkins explained, the Guidelines are likely to reduce any such chilling effect. He reasoned that under the Guidelines, a defendant "who previously confronted the possibility of a virtually unlimited increase in his sentence if he took the stand on his own behalf but was ultimately convicted, would now be *more* likely to exercise his right when the downside risk he faces has been quantified and limited." App., *infra*, 27a-28a.

REASONS FOR GRANTING THE PETITION

The court of appeals has decided a question of considerable importance to the federal criminal justice system in a manner that expressly conflicts with the decisions of eight other courts of appeals. In holding that Sentencing Guidelines § 3C1.1 cannot constitutionally be applied to a defendant who testifies falsely at trial, the court of appeals disregarded Congress's directive that "no limitation" shall be placed on the information a district court may consider at sentencing, as well as this Court's holding in *United States* v. *Grayson*, 438 U.S. 41 (1978), that a district court may consider, for sentencing purposes, a defendant's perjury at trial without infringing the defendant's right to testify. Given the frequency with which this question will arise, review by this Court is clearly warranted.

1. There is a clear conflict among the courts of appeals on the question whether Sentencing Guidelines § 3C1.1 can constitutionally be applied to a defendant who testifies falsely at trial. Nine circuits have addressed that question. Each of those courts—

other than the court below—has held that the Constitution does not prohibit a district court from enhancing a defendant's sentence under Guidelines § 3C1.1 if the court finds that the defendant gave false testimony at trial. See *United States* v. *Bautista-Polanco*, 927 F.2d 14, 22 (1st Cir. 1991);[2] *United States* v. *Matos*, 907 F.2d 274, 276 (2d Cir. 1990); *United States* v. *Acosta-Cazares*, 878 F.2d 945, 953 (6th Cir.), cert. denied, 493 U.S. 899 (1989); *United States* v. *Contreras*, 937 F.2d 1191, 1194-1195 (7th Cir. 1991); *United States* v. *Wagner*, 884 F.2d 1090, 1098-1099 (8th Cir. 1989), cert. denied, 494 U.S. 1088 (1990);[3] *United States* v. *Barbosa*, 906 F.2d 1366, 1369-1370 (9th Cir.), cert. denied, 111 S. Ct. 394 (1990); *United States* v. *Beaulieu*, 900 F.2d 1537, 1539-1540 (10th Cir.), cert. denied, 110 S. Ct. 3252 (1990);[4] *United States* v. *Wallace*, 904 F.2d 603, 604-605 (11th Cir. 1990).

After the Fourth Circuit issued its decision in this case, the Seventh and Eighth Circuits reconsidered the question whether Sentencing Guidelines § 3C1.1 may constitutionally be applied to perjury at trial. After doing so, both courts rejected the Fourth Circuit's analysis and reaffirmed their prior holdings. *United States* v. *Jones*, Nos. 90-3498 *et al.* (7th Cir. Dec. 19, 1991), slip op. 11; *United States* v. *Ogbeifun*, 949 F.2d 1013, 1013-1014 (8th Cir. 1991). Accordingly, there is a square conflict among the cir-

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[2] Accord *United States* v. *Akitoye*, 923 F.2d 221, 228 (1st Cir. 1991).

[3] Accord *United States* v. *O'Meara*, 895 F.2d 1216, 1220 (8th Cir.), cert. denied, 111 S. Ct. 352 (1990).

[4] Accord *United States* v. *Keyes*, 899 F.2d 983, 988 (10th Cir.), cert. denied, 111 S. Ct. 160 (1990).

cuits on the constitutionality of applying the two-level enhancement of Sentencing Guidelines § 3C1.1 to a defendant who commits perjury at trial.

2. The question whether Sentencing Guidelines § 3C1.1 can constitutionally be applied in such circumstances will arise with considerable frequency. The issue has arisen on numerous occasions since the Sentencing Guidelines went into effect on November 1, 1987, and it is certain to recur with regularity, since there are hundreds of federal criminal cases each year in which a testifying defendant is convicted. It is important for the district courts to know in such cases whether to apply the Guidelines sentencing enhancement if they find that the defendants testified falsely at trial. Because the Fourth Circuit's ruling is based on an interpretation of the Constitution, the conflict among the circuits cannot be resolved by modifying the Guidelines, other than by wholesale abandonment of the position that perjury at trial is a legitimate sentencing enhancement factor. And because the Fourth Circuit appears to be committed to its minority position, see *United States* v. *Craigo*, No. 90-5351 (4th Cir. Feb. 3, 1992), slip op. 5-6 (following the decision below), the conflict is one that will require this Court's intervention to resolve.

3. The decision below is clearly incorrect. Before the Sentencing Guidelines went into effect, a district court could take into account at sentencing its belief that the defendant committed perjury when he testified. Nothing in the Sentencing Guidelines altered that well-settled rule or justifies the conclusion that the Constitution requires that a different balance now must be struck.

a. This Court has long recognized that "[h]ighly relevant—if not essential—to [the] selection of an appropriate sentence is the possession of the fullest

information possible concerning the defendant's life and characteristics." *Williams* v. *New York*, 337 U.S. 241, 247 (1949). To ensure that the district courts would have the widest possible range of information available at sentencing, Congress directed that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." 18 U.S.C. 3577 (1982).

Among the factors that courts commonly took into account at sentencing was the defendant's commission of perjury while testifying at his trial. This Court endorsed that practice in *United States* v. *Grayson*, *supra*. *Grayson* recognized that "[a] defendant's truthfulness or mendacity while testifying on his own behalf, almost without exception, has been deemed probative of his attitudes toward society and prospects for rehabilitation and hence relevant to sentencing." 438 U.S. at 50. See *id.* at 53 ("the evolutionary history of sentencing * * * demonstrates that it is proper—indeed, even necessary for the rational exercise of discretion—to consider the defendant's whole person and personality, as manifested by his conduct at trial and his testimony under oath, for whatever light those may shed on the sentencing decision"). This Court found "persuasive" the proposition that even "'[i]f the notion of "repentance" is out of fashion today, the fact remains that a manipulative defiance of the law is not a cheerful datum for the prognosis a sentencing judge undertakes.'" *Id.* at 51 (citation omitted).

The Court in *Grayson* deemed "without basis" the claim that allowing the courts to consider a defendant's false testimony would impermissibly "chill" a defendant's willingness to exercise his right to testify

on his own behalf. As the Court explained, even if a sentencing judge's consideration of a defendant's untruthfulness might have a chilling effect on the defendant's decision to testify falsely, "that effect is entirely permissible. There is no protected right to commit perjury." 438 U.S. at 54. The Court treated as "entirely frivolous" the proposition that allowing sentencing courts to follow this practice would inhibit defendants from testifying truthfully. *Id.* at 55. *Grayson* thus makes clear that the Constitution does not prohibit a court from enhancing the defendant's sentence on the ground that he perjured himself while testifying at trial.

b. Nothing in the Sentencing Reform Act of 1984, 18 U.S.C. 3551-3742 and 28 U.S.C. 991-998, and the Sentencing Guidelines renders the principles described by the Court in *Grayson* inapplicable to modern federal sentencing. Although in the 1984 Act Congress sought to channel the courts' exercise of their sentencing discretion, it did not restrict the information that district courts may consider at sentencing. On the contrary, Congress reaffirmed the prior rule that "[n]o limitation" should be placed on the information that district courts may take account of at sentencing. 18 U.S.C. 3661.

The Sentencing Guidelines incorporate that principle as well. Section 6A1.3 of the Guidelines provides that district courts may consider any reliable evidence at sentencing.[5] In particular, the Sentencing Guidelines make clear that a district court must con-

[5] Section 6A1.3 (Policy Statement) provides that:

> (a) * * * In resolving any reasonable dispute concerning a factor important to the sentencing determination, the court may consider relevant information without regard to its admissibility under the rules of evidence at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy.

sider whether the defendant gave false testimony at trial. Section 3C1.1 of the Guidelines requires the court to give a two-level enhancement for obstruction of justice, and the Commentary to the Guideline explains that "the types of conduct to which this enhancement applies" include "committing * * * perjury."[6] Accordingly, Sentencing Guidelines § 3C1.1 authorizes a district court to impose the type of sentencing enhancement that this Court upheld in *Grayson*. As the Seventh Circuit put it, Section 3C1.1 is "merely the technical means by which sentencing courts can continue under the Guidelines to consider the kind of evidence approved by the Court in *Grayson*." *Contreras*, 937 F.2d at 1195.

c. The reasons given by the court of appeals do not justify the conclusion that Sentencing Guidelines § 3C1.1 cannot constitutionally be applied to a defendant who gives false testimony at trial.

First, the court found it significant that Sentencing Guidelines § 3C1.1 classifies the defendant's false testimony as "obstruction of justice," whereas *Grayson* treated a defendant's perjury as simply one factor bearing on rehabilitation and incapacitation. App., *infra*, 12a-13a. The label used to describe Sentencing Guidelines § 3C1.1, however, does not govern

[6] The version of the Commentary that was in effect at the time of respondent's sentencing was essentially the same. It provided that "testifying untruthfully * * * concerning a material fact" was one of the grounds for applying the Section 3C1.1 enhancement. Guidelines § 3C1.1, Application Note 1(c) (Nov. 1989). Although the Guideline itself has been amended since the time of petitioner's sentencing, the only material change was the addition of a reference to the obstruction of justice at sentencing. *Guidelines Manual* App. C, amendment 347, at 163 (Nov. 1991). The other changes in the Guideline and application notes were intended only for clarification. *Ibid.*

the question of its constitutionality. Moreover, it is clear that enhancing a defendant's sentence based on his willingness to commit perjury is consistent with the penological goals on which the Guidelines are based. A defendant who commits perjury at trial indicates his willingness to break the law whenever he finds it in his interest. Because a willingness to break the law is indicative of the defendant's continuing danger to the community, it justifies incapacitating him for a longer period than would otherwise be necessary. See 18 U.S.C. 3553(a)(2)(C) (sentence should "protect the public from further crimes of the defendant").

To be sure, the Sentencing Guidelines do not leave the consideration of trial perjury to the sentencing court's discretion; the Guidelines require a court to enhance a defendant's sentence for perjury, and they specify how much weight that factor will have. But the mandatory nature of the Guidelines in this regard is simply the inevitable result of channeling the courts' discretion through a system of Sentencing Guidelines; it is not a veiled effort to punish the defendant for a new offense. The use of the label "obstruction of justice" to describe the enhancement for perjury at trial therefore does not make that enhancement unconstitutional.

Second, the court of appeals believed that the enhancement imposed by Sentencing Guidelines § 3C1.1 would be applied to every testifying defendant who is convicted. App., *infra*, 13a-14a.[7] That view is

[7] Relying on a statement made at the oral argument by an Assistant United States Attorney, the Fourth Circuit believed that the government's position is that "every defendant who takes the stand and is convicted should be given the obstruction of justice enhancement." App., *infra*, 10a. That is not our position. In our rehearing petition, we pointed out that we do not take the position that every testifying defendant who is convicted should, for that reason alone, receive an enhancement under Sentencing Guidelines § 3C.1.

mistaken. Guidelines § 3C1.1 requires a court to impose an enhancement in every case in which the court finds that a defendant committed perjury while testifying, but it does not require an enhancement just because a defendant testifies and is convicted. That distinction is important, because a testifying defendant who is convicted does not, by that fact alone, "obstruct justice" under Sentencing Guidelines § 3C1.1.[8]

Third, the court of appeals noted that in *Grayson* this Court left a district court discretion whether to enhance the defendant's sentence if he testified falsely, whereas Sentencing Guidelines § 3C1.1 *requires* a court to enhance the defendant's sentence if the court finds that the defendant gave false testimony. App., *infra*, 13a. The court believed that the "automatic" nature of the Section 3C1.1 enhance-

[8] That point is illustrated by the Seventh Circuit's decision in *United States* v. *Lozoya-Morales*, 931 F.2d 1216 (1991). There, the district court penalized the defendant under Sentencing Guidelines § 3C1.1 for his untruthful trial testimony, stating that "[i]f a defendant gets up on the stand and gives a story that the jury does not believe, the jury is finding that he is not telling the truth." 931 F.2d at 1218. The court of appeals rejected that approach, stating that it is improper to "[i]mpos[e] the penalty automatically from a jury verdict that concededly does not establish the defendant lied in his testimony." *Id.* at 1219. Only if the district court finds that the defendant perjured himself (or if the record compels such a conclusion) would the Section 3C1.1 enhancement be warranted. 931 F.2d at 1219-1220. See also *United States* v. *Martinez*, 922 F.2d 914, 925-926 (1st Cir. 1991) (rejecting claim that defendant may be found to have committed obstruction of justice under Section 3C1.1 simply because he testified and the jury nevertheless convicted him).

ment might tip the scales against testifying for "an innocent defendant with prior convictions." App., *infra*, 11a-12a. But as Judge Wilkins noted in dissent from denial of en banc review, respondent was in a position to make a precise calculation of what perjury might cost her, *i.e.*, the addition of two levels to her base offense level. Prior to the Guidelines, the district courts enjoyed unfettered discretion to penalize defendants up to the statutory maximum when the courts found the defendants had testified falsely at trial. Moreover, in the pre-Guidelines era a district court did not have to state reasons for the sentence imposed. A defendant therefore could never be sure that the court would not enhance his sentence just because the jury convicted him. By contrast, the district court cannot impose an enhancement under Sentencing Guidelines § 3C1.1 simply because a defendant is convicted after testifying; the court must make a finding that the defendant committed perjury before enhancing a defendant's sentence on that ground. Accordingly, it is far from clear that the "chilling" effect of using trial perjury to enhance a sentence is any greater under the Guidelines than it was under the pre-Guidelines regime.

In sum, the change-over to the Sentencing Guidelines system did not have the dual effect of (1) rendering this Court's analysis in *Grayson* inapplicable and (2) creating a constitutional bar to a sentencing court's consideration of the defendant's perjury at trial. All the courts of appeals except the Fourth Circuit agree that *Grayson* applies under the Sentencing Guidelines, just as it did before. This Court should grant review to resolve the conflict between the Fourth Circuit and the other courts of appeals on that important constitutional question.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

KENNETH W. STARR
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FEBRUARY 1992

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 90-5668

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

SHARON DUNNIGAN, DEFENDANT-APPELLANT

Appeal from the United States District Court for the Southern District of West Virginia, at Charleston
John T. Copenhayer, Jr., District Judge
(CR-89-36)

Argued: April 12, 1991

Decided: August 30, 1991

Before HALL and PHILLIPS, Circuit Judges, and WILLIAMS, United States District Judge for the Eastern District of Virginia, sitting by designation.

OPINION

HALL, Circuit Judge:

Sharon Duningan appeals her conviction and sentence for conspiracy to distribute cocaine. We affirm her conviction; however, we vacate her sentence and remand for resentencing.

I.

The cocaine distribution conspiracy in this case is not complex. Freddie Harris was a notorious cocaine dealer in the Charleston, West Virginia, area. His ring was broken up in the late summer of 1988. Harris pled guilty to cocaine distribution charges, as did his coconspirators John Dean, Doris Casto, Wynema Brown, and Tammy Moore. Several others went to trial, including Andre Charlton and, later, appellant Sharon Dunnigan.

Dunnigan was charged March 7, 1989, in a one-count indictment, with conspiracy to distribute cocaine with Harris and unnamed others during the summer of 1988. She filed pretrial motions to dismiss the indictment, for a bill of particulars and for disclosure of exculpatory and Jencks Act material.

At a hearing on the motions, the government agreed to provide Jencks Act material, notice of "similar acts" evidence, and information regarding any confidential informants. The defendant withdrew her motion for a bill of particulars. The district court denied the motion to dismiss the indictment.

Between the hearing on motions and trial, the government furnished grand jury transcripts, plea agreements and rap sheets for proposed government witnesses, and notice of one "similar act"—a controlled sale of crack cocaine by Dunnigan to a cooperating witness, Edward Dickerson, on July 12, 1988.

Trial was held January 3-4, 1990. The government presented five witnesses in its case-in-chief. Harris, the ringleader, was first. He testified that

Dunnigan was his source of supply in Cleveland, and that she had travelled to Cleveland alone and with him to obtain cocaine during the summer of 1988. Harris also stated that Dunnigan had accompanied Dean to Cleveland for the same purpose at least once. Harris admitted distributing the cocaine in the Charleston area.

Dean took the stand next. Dean met the appellant when, on Harris' instructions, he picked her up at the Charleston bus terminal and took her home. Harris had described Dunnigan to Dean as his "connect." Later that evening, Dean accompanied Harris to Dunnigan's apartment; Harris went inside and obtained cocaine, which Dean then helped package for resale. Dean also testified that he went to Cleveland with Dunnigan on several occasions to purchase cocaine and dilaudid. At the close of Dean's direct examination, the government elicited from him that he was a paranoid schizophrenic and heroin addict.

Dunnigan's counsel was surprised by this revelation. He protested to the court that his cross-examination would be hampered by the government's failure to provide this information before trial notwithstanding a specific discovery request. The government argued that the grand jury transcripts revealed that Dean was a heroin addict, and that it had no documentary evidence to substantiate Dean's mental illness. The district court advised the defendant that Dean's schizophrenia could be inquired into on cross-examination. Dunnigan's trial counsel nonetheless asked no cross-examination questions about Dean's addiction or mental disorders.

Charlton testified next. He said that he had gone with Harris to Dunnigan's apartment to test and package cocaine Dunnigan had brought from Cleve-

land. He also recounted one occasion on which he had received cocaine from Dean. This cocaine had been picked up in Cleveland on one of Dean and Dunnigan's trips together.

Moore was the fourth coconspirator witness. She told of conversations with Dunnigan during which Dunnigan extolled the superior quality of Cleveland cocaine and attempted to solicit Moore to drive her to Cleveland.

Finally, the government called Brown. She stated that Dunnigan had told her of the Cleveland cocaine-purchasing trips, and that she had seen cocaine in Dunnigan's apartment. On four or five occasions, Brown observed Dunnigan's daughter "rocking up" powder cocaine (i.e. making it into crack) for Dunnigan. Dunnigan would later return the crack cocaine to her daughter to sell. Brown also stated that Dunnigan kept cocaine in a little tin case. The defendant made no objections to any of Brown's testimony and pursued no cross-examination. Notwithstanding this lack of protest, the district court gave a "similar acts" instruction—if the jury believed the cocaine that Dunnigan's daughter "rocked up" was part of the conspiracy, it could consider it for that purpose; however, the court stated, Dunnigan was not charged with distributing crack, and if the cocaine from which it was made was outside the conspiracy, the jury could only consider the evidence for the limited purposes of Fed. R. Evid. 404(b): motive, intent, preparation, lack of mistake, and knowledge.

The government rested, and Dunnigan presented a simple defense. She took the stand and denied everything. She testified that she did not buy, sell, or use cocaine during the time she knew Harris. She said

that she did not know anyone in Cleveland who used cocaine.

She admitted going to Cleveland, but only to visit relatives. She said that she went to Cleveland with Harris once, because she knew her way around, but she did not know whether Harris bought or tried to buy any cocaine on that trip. She flatly denied the trips and transactions described by Dean and Charlton, and she had no knowledge of anyone making cocaine into crack at her apartment.

On cross-examination, the government asked her about a specific transaction: whether she had sold crack to Edward Dickerson on July 12, 1988, at her apartment. She denied it.

The defense rested, and the government began a devastating rebuttal. Dickerson was the first witness. He testified that he had been arrested in early 1988 and had become an informant. On July 12, 1988, in a monitored transaction, he bought crack from Dunnigan at her apartment. Dunnigan did not object to this testimony.

Moore then retook the stand to describe her purchases of crack cocaine from the defendant. She had also seen Dunnigan give crack and powder cocaine to her daughter. Finally, Moore said that she and Dunnigan's daughter sold crack together and returned part of the money to Dunnigan. Again, the defendant did not object to any of Moore's story. Again, the district court gave the jury a "similar acts" limiting instruction.

The jury found Dunnigan guilty. Her base offense level for sentencing was 22. She did not receive the two-level acceptance of responsibility reduction, because she continued to maintain her innocence. Moreover, the district court increased the offense level

by 2 to 24 for "obstruction of justice," based on its finding that Dunnigan testified untruthfully at her trial. She was sentenced to 51 months, the lowest end of the guideline range.

II.

Dunnigan first argues that the district court erred by denying her motions to dismiss the indictment and for a bill of particulars. These arguments are related, because a bill of particulars is a defendant's means of obtaining specific information about charges brought in a vague or broadly-worded indictment. *United States v. Debrow*, 346 U.S. 374, 378 (1953).

An indictment may simply be a short, plain statement of the charge, sufficiently precise to notify the defendant of the accusation he must meet and to protect him from double jeopardy. *United States v. American Waste Fiber Co.*, 809 F.2d 1044, 1046 (4th Cir. 1987). The indictment of Dunnigan was sufficient. It identified the time frame of the activity (early to late summer of 1988), the place (at or near Charleston), a coconspirator (Harris), the controlled substance involved, and the statutes violated. The indictment tracked the statutory language defining the offense and apprised Dunnigan that other unnamed coconspirators, whose identities were known and unknown to the grand jury, were involved.

Among her pretrial motions, Dunnigan moved for a bill of particulars. She wanted the names of those to whom she had allegedly sold cocaine, notice of any "similar acts" the government planned to use, and the like. At a pretrial hearing on the motions, Dunnigan's counsel was satisfied with the government's proposed disclosures and specifically dropped the request for a bill of particulars. Waivers are rarely more explicit. In any event, Dunnigan was given the names of the government's witnesses and received grand jury transcripts. The denial of a bill of particulars did not leave her facing a trial unaware of the nature of the charges against her.

III.

Ordinarily, proof of crimes or bad acts other than those charged is inadmissible to show that the defendant acted in conformity with a character trait. However, the evidence of such acts is admissible for limited collateral purposes such as knowledge, intent, motive, absence of mistake, and common scheme or plan. Fed. R. Evid. 404.

Dunnigan now argues that she was hopelessly prejudiced by admission of the testimony that she helped her daughter use and sell crack cocaine. We do not doubt that this testimony was very damaging; however, Dunnigan made no objections to this evidence at trial, and the court may reverse only if admission of the evidence was plain error.

All of the "similar acts" evidence presented on rebuttal was invited by Dunnigan. She denied using cocaine or knowing that anyone sold cocaine out of her house. The government was entitled to rebut these assertions.

A closer issue is Brown's testimony in the government's case-in-chief about Dunnigan giving her daughter cocaine to "rock up." Nonetheless, Dunnigan did not object, and the district court *sua sponte* gave a limiting instruction. Admitting the testimony with a limiting instruction does not rise to plain error, if error at all.

IV.

The government now admits, albeit equivocally, that it should have disclosed Dean's schizophrenia before trial. "If Dean's mental condition was such that it would have reflected adversely on his credibility, the United States should have provided this information to the defendant." Brief of the United States, at 39.[1] However, every *Brady*[2] violation does not warrant reversal. Only where the evidence is so material that its nondisclosure undermines confidence in the confidence in the verdict is reversal necessary. *United States v. Bagley*, 473 U.S. 667 (1985).

Dunnigan did not request a continuance and did not ask a single question on cross-examination about Dean's condition. Moreover, though the exculpatory evidence may not have been presented as fully as Dunnigan would have liked (though she does not say what else she would now offer), the jury did in fact hear it. Dunnigan would have a better argument if the government had withheld the information from the jury. Finally, Dean was one of a half-dozen government witnesses telling the same story; his testimony was important, but not vital.

Our confidence in the verdict is not undermined by the nondisclosure of Dean's mental problems. Therefore, any *Brady* error was harmless.

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[1] The Assistant U.S. Attorney on appeal did not represent the government at trial. The trial prosecutor interpreted her duty to disclose exculpatory information to apply only to documentary evidence.

[2] *Brady v. Maryland*, 373 U.S. 83 (1963).

V.

A.

The district court found that Dunnigan had testified untruthfully at trial, and so enhanced her offense level by two for "obstruction of justice." Committing or suborning perjury has always been identified as "obstruction of justice" in the Guidelines Commentary. U.S.S.G. § 3C1.1, comment. (n.1(c)) (Nov. 1989); *Id.*, comment. (n.3(b)) (Nov. 1990).

At the time Dunnigan was charged, convicted, and sentenced, Application Note 3 to U.S.S.G. § 3C1.1 stated: "This provision is not intended to punish a defendant for the exercise of a constitutional right. A defendant's denial of guilt is not a basis for application of this provision." Furthermore, Application Note 2 stated that "suspect testimony and statements should be evaluated in a light most favorable to the defendant."[3]

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[3] Effective November 1, 1990, the substance of former Application Notes 2 and 3 were amalgamated into new note 1:

> This provision is not intended to punish a defendant for the exercise of a constitutional right. A defendant's denial of guilt (other than a denial of guilt under oath that constitutes perjury), refusal to admit guilt or provide information to a probation officer, or refusal to enter a plea of guilty is not a basis for application of this provision. In applying this provision, the defendant's testimony and statements should be evaluated in a light most favorable to the defendant.

The primary purpose of the 1990 amendment was to add a new guideline governing "reckless endangerment during flight." The other changes, including the one described above, were intended only for clarification. United States Sentencing Commission, *Guidelines Manual*, Appendix C, amendment 347 (Nov. 1990).

All circuits that have considered the issue have upheld the constitutionality of similar enhancements under § 3C1.1. These decisions are based on the premise that a defendant's right to testify in his own behalf is not a license to commit perjury. *United States v. Batista-Polanco*, 927 F.2d 14, 22 (1st Cir. 1991); *United States v. Matos*, 907 F.2d 274, 276 (2nd Cir. 1990); *United States v. Acosta-Cazares*, 878 F.2d 945, 953 (6th Cir.), *cert. denied*, 110 S.Ct. 255 (1989); *United States v. O'Meara*, 895 F.2d 1216 (8th Cir.), *cert. denied*, 111 S.Ct. 352 (1990); *United States v. Barbosa*, 906 F.2d 1366, 1369 (9th Cir.), *cert. denied*, 111 S.Ct. 394 (1990); *United States v. Keys*, 899 F.2d 983 (10th Cir.), *cert. denied*, 111 S.Ct. 160 (1990); *United States v. Wallace*, 904 F.2d 603, 604-605 (11th Cir. 1990).

B.

Our sense of justice requires us to disagree. We of course have no desire to condone or encourage perjury. On the other hand, we fear that this enhancement will become the commonplace punishment for a convicted defendant who has had the audacity to deny the charges against him. The government maintained at oral argument that every defendant who takes the stand and is convicted should be given the obstruction of justice enhancement. Certainly, if the guidelines are to be applied consistently, the government would be right. Nearly all testifying defendants tell a story that, if believed in full, would result in acquittal. The jury's verdict implies a disbelief of some material aspect of the defendant's testimony.

It disturbs us that testimony by an accused in his own defense, so basic to justice, is deemed to "obstruct" justice unless the accused convinces the jury.

The facile logic of hindsight deems such disbelieved testimony a lie; inasmuch as there is no right to lie, there is no harm in sanctioning it. Hindsight, however, does not help the accused when he must decide whether to take the stand. He already knows that he faces the possibility of conviction, and that he is much less likely to be acquitted if he remains silent, despite his right to do so and even in the face of instructions to the jury to draw no adverse inference from his silence. Kassin, The American Jury: Handicapped in the Pursuit of Justice, 51 Ohio St. L.J. 687, 700 (1990), *citing* Shaffer & Case, On the Decision Not to Testify in One's Own Behalf: Effects of Withheld Evidence, Defendant's Sexual Preferences, and Juror Dogmatism on Juridic Decisions, 42 J. Personality & Soc. Psychology 335, 344 (1982); Note, The Influence of the Defendant's Plea on Judicial Determination of Sentence, 66 Yale L.J. 204, 212 n.36 (1956). *See Lakeside v. Oregon*, 435 U.S. 333, 340 n.10 (1978) (adverse inference from silence "may be inevitable"). Moreover, the dilemma does not arise solely when the defendant is guilty; there are many reasons unrelated to guilt that may militate against testifying. Chief among these is the prosecution's power to impeach the defendant's credibility with prior convictions under Fed. R. Evid. 609. *Carter v. Kentucky*, 450 U.S. 288, 300 n.15 (1981); *Wilson v. United States*, 149 U.S. 60, 66 (1893); Bradley, *Griffin v. California*: Still Viable After All These Years, 79 Mich. L. Rev. 1290, 1295 n.25.[4] We cannot help but note that an innocent defendant with prior convictions must weigh the

[4] Bradley cites statistics from Kalvin & Zeisel, The American Jury 146 (1966), that defendants without prior records are 37% more likely to testify than those with previous convictions. *Id.*

jury's likelihood of drawing one impermissible inference (guilt by silence) against another (guilt by criminal propensity) in deciding whether to testify. With an automatic § 3C1.1 enhancement added to the ante, the defendant may not think testifying worth the risk.[5]

C.

Several of our fellow circuits have relied upon *United States v. Grayson*, 438 U.S. 41 (1978), a pre-guidelines case, as controlling and permitting this enhancement. Some have explicitly stated that the guidelines have not altered the analysis. *E.g.*, *Barbosa*, 906 F.2d at 1369; *United States v. Beaulieu*, 900 F.2d 1537 (10th Cir.), *cert. denied*, 110 S.Ct. 3252 (1990). We believe that a close look at *Grayson*'s rationale reveals that the guidelines have removed important underpinnings of the Court's analysis.

The most basic difference in *Grayson* is the stated justification for enhancing sentence. The guidelines deem a denial of guilt on the stand "obstruction of justice." There is no such rationale in *Grayson*. *Grayson* rejected an argument that due process prohibits consideration at sentencing of the defendant's untruthfulness, because it amounts to punishment for perjury without indictment and trial for perjury. The Court acknowledged that punishment for perjury to save the government the time and expense of prosecution would be "impermissible," but refused to prohibit the "otherwise *permissible* practice of considering a defendant's untruthfulness for the purpose of

[5] For example, the enhancement increased Dunnigan's guidelines range from 41-51 to 51-63 months. At the highest offense levels, the increase is more drastic, from 292-365 months to 360-life.

illuminating his need for rehabilitation and the society's need for protection." 438 U.S. at 53.

The Court was speaking during the long period of our judicial history when district courts enjoyed broad discretion in imposing any sentence within statutory limits. It found that the very uncertainty of a defendant's supposedly untrue trial testimony being considered at sentencing was a defense against Grayson's constitutional attack:

> Nothing we say today requires a sentencing judge to enhance, in some wooden or reflex fashion, the sentences of all defendants whose testimony is deemed false. Rather, we are reaffirming the authority of a sentencing judge to evaluate carefully a defendant's testimony on the stand, determine—with a consciousness of the frailty of human judgment—whether that testimony contained willful and material falsehoods, and, if so, assess in light of all the other knowledge gained about the defendant the meaning of that conduct with respect to his prospects for rehabilitation and restoration to a useful place in society. Awareness of such a process realistically cannot be deemed to affect the decision of an accused but unconvicted defendant to testify truthfully in his own behalf.

Grayson, 438 U.S. at 55. The guidelines supply precisely the "wooden or reflex" enhancement disclaimed by the Court. A defendant who stands trial has already probably passed up an opportunity, through a negotiated plea, for a lesser charge and sentence. At trial, he must choose between remaining silent, with a heavy risk of conviction, and testifying on pain of facing an enhanced sentence. At every turn, he is encouraged to forfeit his rights, and is subjected to

increased punishment for refusing to do so. When deciding to testify, he is not simply "aware" of a "process" that might take his untruthfulness into account, he is (and ought to be advised by his counsel) aware that the very fact of his testifying will be used against him if he is convicted.

We are not satisfied that there are enough safeguards in place to prevent this enhancement from unfairly coercing defendants, guilty or innocent, into remaining silent at trial. Other circuits have reviewed the district court's finding of untruthfulness under a "clearly erroneous" standard. *Batista-Polanco*, 927 F.2d at 22; *Matos*, 907 F.2d at 276; *Wallace*, 904 F.2d at 605; *Beaulieu*, 900 F.2d at 1540; *O'Meara*, 895 F.2d at 1220. Of course, in light of the jury's verdict of guilt, the district court's finding will never be "clearly erroneous" where the verdict is sustainable; if the verdict cannot be supported, the sentencing finding will of course be moot. Our review of these enhancements would therefore be an empty ritual.

We are similarly unimpressed with the guidelines' admonition to district courts to view the defendant's testimony "in a light most favorable to the defendant." Whatever light is held to it, a defendant's testimony that has been apparently rejected in material respects by a jury will almost always compel a finding of untruthfulness. If the district court does not so find, the "clearly erroneous" standard of review may actually be tested, but, of course, on the government's appeal.

D.

We who have been schooled and immersed in our system of law are perhaps too quick to make the jury an infallible icon and a witness' oath a sacred rite;

we ignore the human infirmities that flaw both. In short, our love of our system easily produces a chauvinistic faith in its perfection.

Nearly twenty years ago, in announcing this circuit's rule permitting, as *Grayson* later did, consideration of a defendant's perjury in setting an indeterminate sentence, Judge Butzner cautioned us to remember these frailties.

> [S]entencing judges should not indiscriminately treat as a perjurer every convicted defendant who has testified in his own defense. Witnesses induced by sordid motives or fear have been known to fabricate accusations with such guile that even conscientious triers of fact have been misled. Moreover, some essential elements of proof of criminal conduct, such as knowledge, intent, malice, and premeditation are sometimes so subjective that testimony about them cannot be readily categorized as true or false. Judges must constantly bear in mind that neither they nor jurors are infallible. A verdict of guilty means only that guilt has been proved beyond a reasonable doubt, not that the defendant has lied in maintaining his innocence.

United States v. Moore, 484 F.2d 1284, 1287-1288 (4th Cir. 1973).

The rigidity of the guidelines makes the § 3C1.1 enhancement for a disbelieved denial of guilt under oath an intolerable burden upon the defendant's right to testify in his own behalf. Consequently, though we affirm Dunnigan's conviction, we remand for resentencing without the enhancement for obstruction of justice.

CONVICTION AFFIRMED; SENTENCE VACATED AND REMANDED

APPENDIX B

FILED November 15, 1991

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 90-5668
CR-89-36

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

SHARON DUNNIGAN, DEFENDANT-APPELLANT

CORRECTED ORDER

The appellee filed a petition for rehearing with suggestion for rehearing in banc. A member of the Court requested a poll on the suggestion for rehearing in banc. The poll failed by an evenly-divided vote. Judges Widener, Wilkinson, Wilkins, Niemeyer, Hamilton, and Luttig voted to rehear the case in banc, and Judges Ervin, Russell, Phillips, Murnaghan, Sprouse, and Hall voted against rehearing in banc.

The original judicial panel voted to deny the petition for rehearing.

The Court denies the petition for rehearing and suggestion for rehearing in banc.

Entered at the direction of Judge Hall, with the concurrence of Judge Phillips and Judge Williams, U.S. District Judge sitting by designation. Judge

Wilkins reserves the right to file a dissenting opinion to the denial of the suggestion for rehearing in banc.

For the Court,

/s/ John M. Greacen
JOHN M. GREACEN
Clerk

WILKINS, Circuit Judge, dissenting:

The panel opinion holds that a sentencing enhancement for obstruction of justice based upon a defendant's perjury at trial, *see* United States Sentencing Commission, *Guidelines Manual*, § 3C1.1 (Nov. 1989), constitutes an intolerable burden on a defendant's right to testify.[1] *United States v. Dunnigan*, 944 F.2d 178 (4th Cir. 1991). The panel reasons that the potential for an obstruction enhancement would impermissibly chill a defendant's right to testify and that section 3C1.1, as an automatic enhancement for which meaningful appellate review is unavailable, is antithetic to the sentencing enhancement for untruthfulness held permissible by the Supreme Court in *United States v. Grayson*, 438 U.S. 41 (1978). *Id.* All other circuits that have addressed this issue have upheld the constitutionality of section 3C1.1 "based on the premise that a defendant's right to testify in his own behalf is not a license to commit perjury." *Id.* at 183; *see, e.g.*, *United States v. Batista-Polanco*, 927 F.2d 14 (1st Cir. 1991); *United States v. Matos*, 907 F.2d 274 (2d Cir. 1990); *United States v. Acosta-Cazares*, 878 F.2d 945 (6th Cir.), *cert. denied*, 110 S. Ct. 255 (1989); *United States v. Fiala*, 929 F.2d 285 (7th Cir. 1991) (dicta); *United States v. Wagner*, 884 F.2d 1090 (8th Cir. 1989), *cert. denied*, 110 S. Ct. 1829 (1990); *United States v. Barbosa*, 906 F.2d

[1] *Dunnigan* does not prohibit application of the enhancement to a defendant who, for example, suborns the perjury of others or lies to judicial or law enforcement personnel. It is ironic that the panel forbids the application of the enhancement to a defendant who commits perjury, but would permit its application to a defendant who lies to a probation officer in an unsworn interview.

1366 (9th Cir.), *cert. denied*, 111 S. Ct. 394 (1990); *United States v. Keys*, 899 F.2d 983 (10th Cir.), *cert. denied*, 111 S. Ct. 160 (1990); *United States v. Wallace*, 904 F.2d 603 (11th Cir. 1990) (per curiam). Because I believe that the rationale of the panel is wrong, and because the panel opinion creates a split in the circuits,[2] I respectfully dissent.

I.

A.

In the pre-guidelines case *United States v. Grayson*, the Supreme Court addressed whether the district court erred in considering at sentencing that the defendant had testified falsely during his trial. 438 U.S. 41. Grayson argued that the sentencing enhancement violated his right to due process because it "constitute[d] punishment for the crime of perjury for which he ha[d] not been indicted, tried, or convicted." *Id.* at 52. Additionally, Grayson contended "that permitting consideration of perjury [in fashioning an appropriate sentence] will 'chill' defendants from exercising their right to testify on their own behalf." *Id.*

The Court rejected both arguments. *Id.* at 53-55. The Court concluded that a defendant's right to testify is "the right to testify truthfully in accordance with the oath," and stated:

[2] Not only does the panel adopt a position at odds with every circuit that has addressed this question, but it does so on a constitutional basis, thereby preventing the United States Sentencing Commission from using its authority, acknowledged in *Braxton v. United States*, to resolve the conflict. 111 S. Ct. 1854, 1857-58 (1991).

> Assuming, *arguendo*, that the sentencing judge's consideration of defendants' untruthfulness in testifying has any chilling effect on a defendant's decision to testify falsely, that effect is entirely permissible. There is no protected right to commit perjury.

Id. at 54. The Court also discussed the corollary argument that the consideration of perjury at sentencing will inhibit a defendant's right to testify truthfully. This argument, the Court found, was "entirely frivolous." *Id.* at 55. Thus, the Court directly repudiated the rationale, upon which the panel relies, that consideration of a defendant's false trial testimony in fashioning a sentence is an undue burden on a defendant's right to testify.

B.

The panel attempts to avoid the result mandated by *Grayson* by concluding that the justification underlying the *Grayson* decision is not present under guideline sentencing. Additionally, the panel endeavors to distinguish *Grayson* by maintaining that the section 3C1.1 enhancement is the type of automatic enhancement rejected by the Court in *Grayson*. These efforts cannot withstand scrutiny.

The panel reasons that the stated justification underlying the *Grayson* decision—that consideration of a defendant's untruthfulness may provide the sentencing court guidance as to a defendant's "need for rehabilitation and society's need for protection," *id.* at 53—is not present in the guidelines which "deem a denial of guilt on the stand 'obstruction of justice.'" *Dunnigan*, 944 F.2d at 184. This rational is incorrect. In promulgating the sentencing guidelines, the Sentencing Commission sought to "further the

basic purposes of criminal punishment, *i.e.*, deterring crime, incapacitating the offender, providing just punishment, and rehabilitating the offender." U.S.S.G. Ch.1, Pt.A(2), intro. comment. Perjured testimony by a defendant is an equally appropriate consideration in sentencing under the philosophies of sentencing recognized in *Grayson* and the sentencing guidelines.

Next, the *Dunnigan* panel characterizes the obstruction guideline as supplying "precisely the 'wooden or reflex' enhancement disclaimed by the [*Grayson*] Court." *Dunnigan*, 944 F.2d at 184 (quoting *Grayson*, 438 U.S. at 55). The panel posits that a defendant knows that he is "less likely to be acquitted if he remains silent, despite his right to do so and even in the face of instructions to the jury to draw no adverse inference from his silence." *Id.* at 183. Additionally, the panel submits that a defendant who wishes to testify on his own behalf must weigh the potential consequences of remaining silent against the possibility that otherwise inadmissible evidence will be introduced to impeach his credibility if he chooses to testify. *Id.* The panel concludes that if an "automatic" enhancement for obstruction of justice is imposed when a defendant testifies and is nevertheless convicted, the burden would be too great and "the defendant may not think testifying worth the risk." *Id.* at 184.

This reasoning illustrates a misconception on the part of the panel as to the nature and proper application of section 3C1.1. The obstruction enhancement is not designed "to punish a defendant for the exercise of a constitutional right." U.S.S.G. § 3C1.1, comment. (n.3). Nor is it designed to apply automatically in the case of a defendant who tes-

tifies in his own defense but is nevertheless convicted.

Section 3C1.1 provides:

> If the defendant willfully impeded or obstructed, or attempted to impede or obstruct the administration of justice during the investigation or prosecution of the instant offense, increase the offense level by 2 levels.

U.S.S.G. § 3C1.1. This guideline is not to be applied indiscriminately to every defendant who testifies and is ultimately convicted. A defendant may testify to matters not directly related to factual guilt or innocence. For example, a defendant may present evidence attempting to establish excuse—self-defense, duress, mistake of law or fact—that even if true may not legally exculpate him or prevent a jury from finding him guilty. Only when a district court, viewing the testimony in the light most favorable to the defendant, determines that the testimony was false and constituted a willful obstruction of justice, should the district court impose the section 3C1.1 enhancement. U.S.S.G. § 3C1.1, 3C1.1, comment. (nn.1(c), 2).

The panel attempts to support its assertion that the enhancement is automatic by contending that effective redress at the appellate level for improper application of the guideline is unavailable. Whether a defendant's testimony at trial was untruthful is reviewed under a clearly erroneous standard. *See United States v. Batista-Polanco*, 927 F.2d 14, 22 (1st Cir. 1991); *United States v. Matos*, 907 F.2d 274, 276 (2d Cir. 1990); *United States v. O'Meara*, 895 F.2d 1216, 1220 (8th Cir.), *cert. denied*, 111 S. Ct. 353 (1990); *United States v. Wallace*, 904 F.2d 603, 605 (11th Cir. 1990). The panel writes:

> [I]n light of the jury's verdict of guilt, the district court's finding will never be "clearly erroneous" where the verdict is sustainable; if the verdict cannot be supported, the sentencing finding will of course be moot.

Dunnigan, 944 F.2d at 185.

This argument fails for two reasons. First, it assumes that appellate courts are disinclined to engage in a thorough review of the challenged factual determinations as mandated by law. *See* 18 U.S.C.A. § 3742(e) (West Supp. 1991). In practice, courts have uniformly rejected the mechanistic application of section 3C1.1 envisioned by the panel, evinced a willingness to undertake review of challenged factual determinations, and carefully considered the factual support for the findings of the district court, even when that result is ultimately upheld. *See, e.g., United States v. Lozoya-Morales*, 931 F.2d 1216 (7th Cir. 1991) (vacating a section 3C1.1 enhancement when the district court applied it without making an independent finding of untruthfulness, and instead relied solely upon the jury's guilty verdict after the defendant had testified); *United States v. Martinez*, 922 F.2d 914 (1st Cir. 1991) (rejecting argument by Government that an enhancement for role in the offense based on the possession of a key mandated an enhancement for obstruction because it necessarily followed that the defendant was lying when he denied ownership of the key at trial); *see also United States v. Rehal*, 940 F.2d 1 (1st Cir. 1991) (enhancement proper when conclusion of the district court that defendant had testified untruthfully and had advised potential witnesses to change their stories or to refuse to cooperate with law en-

forcement personnel was not clearly erroneous); *United States v. Barry*, 938 F.2d 1327 (D.C. Cir. 1991) (vacating section 3C1.1 enhancement that the district court had applied on the basis of perjured testimony); *United States v. Jackson*, 935 F.2d 832 (7th Cir. 1991) (vacating an obstruction enhancement when the evidence indicated solely that the defendant did not tell everything he knew about a codefendant's criminal activity); *United States v. Bonds*, 933 F.2d 152 (2d Cir. 1991) (per curiam) (basing a section 3C1.1 enhancement on the fact that defendant had changed his appearance after being served with a subpoena was improper, but basing it on a deliberate falsehood under oath was proper);[3] *United States v. Urbanek*, 930 F.2d 1512 (10th Cir. 1991) (reversing an obstruction of justice enhancement when the defendant made false statements, but none of the false statements could be shown to have impeded the investigation); *United States v. Hamilton*, 929 F.2d 1126 (6th Cir. 1991) (enhancement for obstruction was proper when the evidence indicated that defendant had perjured himself repeatedly during his sentencing hearing); *United States v. Hassan*, 927 F.2d 303 (7th Cir. 1991) (enhancement proper when the evidence indicated that defendant had lied repeatedly at detention and sentencing hearings). To date, not a single appellate court has affirmatively supported the type of automatic, mechanistic enhancement over which the panel expresses its concern.

[3] In *Bonds*, the Second Circuit specifically noted that upholding the enhancement on the basis of perjured testimony "should not be interpreted as authorizing sentencing judges to impose obstruction of justice upgrades whenever a defendant has testified on his own behalf." 933 F.2d at 155.

Second, defendants who challenge factual determinations underlying section 3C1.1 have no greater burden than those challenging other factual findings. The position advanced by the panel is equally applicable to all factual determinations made by a sentencing court, findings that are subject to the clearly erroneous standard on review. While this burden may be difficult to meet, this fact does not render the finding constitutionally suspect. If this were a valid reason to prohibit the consideration of information that may adversely impact a defendant's sentence, all factual findings made by the sentencing court would be equally suspect. In the context of Chapter 3 of the guidelines, the victim-related adjustments in Part A and the adjustments for role in the offense in Part B, as well as the obstruction enhancement in Part C would be prohibited. *See* U.S.S.G. Ch.3, Pts.A-C. Each of these adjustments requires that the district court make factual findings by a preponderance of the evidence that are subject to a clearly erroneous standard on review. A defendant who seeks to challenge the application of any of these adjustments has the same avenue of redress and must meet the same burden. The enhancement for obstruction of justice should not be singled out in this respect.[4]

In summary, the panel cannot distinguish the use of perjured testimony to enhance a defendant's sentence under section 3C1.1 from the use approved in *Grayson*. The general policies underlying the use of the information in pre-guideline practice were not changed by guideline practice. Section 3C1.1 was not

[4] When a case is appealed not by a defendant to protest an enhancement, but by the government to protest the failure by the court to apply one, the government must meet this same burden. Under these circumstances, the clearly erroneous standard of review operates to a defendant's benefit.

intended to be, nor has it been applied, as an automatic enhancement for all defendants who take the stand in their own defense but who are nevertheless convicted. The Supreme Court, in *Grayson*, rejected the argument that consideration of perjured testimony in determining an appropriate sentence would impermissibly chill a defendant's right to testify. The *Grayson* rational is not distinguishable and should control.

II.

Having dismissed controlling Supreme Court authority, the panel seeks to justify its conclusion that the potential for a section 3C1.1 enhancement will impermissibly chill a defendant's right to testify. The panel concludes, as noted above, that because a defendant must already weigh the potential consequences of one impermissible inference (guilt based on silence) against another (prior bad acts make it more likely that he committed this act), the addition of an "automatic" enhancement for obstruction of justice for a defendant who chooses to testify but is convicted would be too great a burden and would lead defendants to waive their right to testify. *Dunnigan*, 944 F.2d at 184-85. Aside from the faulty reasoning of the panel with respect to the issue of whether the enhancement is automatic, the argument that the application of section 3C1.1 would chill a defendant's exercise of this protected right is purely speculative.

Prior to the adoption of the sentencing guidelines, it was within the discretion of the sentencing court to enhance a defendant's sentence based upon a finding that the defendant had testified untruthfully at trial. Indeed, under pre-guideline practice the sentencing court could conclude that the sentence should

be increased because of the defendant's perjured testimony, increase the sentence by such amount the court deemed appropriate, and then announce the sentence without providing any explanation or justification for it. Even before the *Grayson* decision, the majority of the courts of appeals addressing the question, including this court, had held that a defendant's untruthfulness at trial could be considered by the sentencing court in fashioning an appropriate sentence. *See, e.g., United States v. Moore*, 484 F.2d 1284 (4th Cir. 1973); *United States v. Hendrix*, 505 F.2d 1233 (2d Cir. 1974), *cert. denied*, 423 U.S. 897 (1975); *United States v. Nunn*, 525 F.2d 958 (5th Cir. 1976); *United States v. Wallace*, 418 F.2d 876 (6th Cir. 1969), *cert. denied*, 397 U.S. 955 (1970); *United States v. Levine*, 372 F.2d 70 (7th Cir.), *cert. denied*, 388 U.S. 916 (1967); *Hess v. United States*, 496 F.2d 936 (8th Cir. 1974); *United States v. Cluchette*, 465 F.2d 749 (9th Cir. 1972); *Humes v. United States*, 186 F.2d 875 (10th Cir. 1951); *but see Scott v. United States*, 419 F.2d 264 (D.C. Cir. 1969) (rejecting argument that perjury was probative of appropriate sentence). The obstruction guideline has not altered past practice in this respect. *See Barbosa*, 906 F.2d at 1369; *United States v. Beaulieu*, 900 F.2d 1537, 1539 (10th Cir.), *cert. denied*, 110 S. Ct. 3252 (1990).

Because under pre-guideline practice the only limitation on the ability of a district court to use a defendant's perjured testimony to enhance his sentence was the statutory maximum penalty, it is illogical to assume that under guidelines practice a defendant may be chilled from exercising his right to testify because he faces the possibility of a two-level enhancement. On the contrary, it is equally plausible that a defendant, who previously confronted the possibility

of a virtually unlimited increase in his sentence if he took the stand on his own behalf but was ultimately convicted, would now be *more* likely to exercise his right when the down-side risk he faces has been quantified and limited. For this reason, the contention that the possibility of a section 3C1.1 enhancement will chill a defendant's exercise of his right to testify is speculative at best.

III.

The panel opinion improperly disregards Supreme Court precedent, exhibits fallacious reasoning, and creates a gratuitous split among the circuit courts of appeals. Therefore, I respectfully dissent from the order denying en banc consideration.

Judge Wilkinson, Judge Niemeyer, and Judge Luttig join in this dissenting opinion.

APPENDIX C

FILED: August 30, 1991

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 90-5668

D/CT#: CR-89-36

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

SHARON DUNNIGAN, DEFENDANT-APPELLANT

Appeal from the United States District Court
for the Southern District of West Virginia
at Charleston

JUDGMENT

This case was heard by the Court on the record from the District Court and was argued by counsel.

The Court affirms the conviction, vacates the sentence and remands the case to the District Court, at Charleston, for resentencing proceedings consistent with this Court's opinion.

/s/ John M. Greacen
Clerk

APPENDIX D

FILED

November 20, 1991

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 90-5668

CR-89-36

US

v.

DUNNIGAN

MANDATE

The judgment of this Court dated 8/30/91 takes effect today.

JOHN M. GREACEN
Clerk

☆ U. S. GOVERNMENT PRINTING OFFICE: 1992 312324 45281

91-1300

No. _____

Supreme Court, U.S.
FILED
MAY 1 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA, PETITIONER

v.

SHARON DUNNIGAN, RESPONDENT

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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12

TABLE OF CONTENTS

TABLE OF AUTHORITIES. ii

SUMMARY OF ARGUMENT 1

ARGUMENT. 2

CONCLUSION. 8

TABLE OF AUTHORITIES

Cases

United States v. Acosta-Cazares, 878 F.2d 945, 953 (6th Cir.), cert. denied, 493 U.S. 899 (1989) 5

United States v. Beaulieu, 900 F.2d 1537, 1541 (10th Cir.), cert. denied, 110 S.Ct. 3252 (1990). 5

United States v. Barbosa, 906 F.2d 1366, 1369 (9th Cir.), cert. denied, 111 S.Ct. 394 (1990). 5

United States v. Bautista-Polanco, 927 F.2d 14, 22 (1st Cir. 1991) 5

United States v. Contreras, 937 F.2d 1191, 1993 (7th Cir. 1991) 5

United States v. Craigo, 956 F.2d 65, 68 (4th Cir. 1992). 4

United States v. Dunnigan, 944 F.2d 178, 185 (4th Cir. 1991) (quoting Moore) 4-7

United States v. Grayson, 438 U.S. 41 (1978). 4-5

United States v. Jones, 950 F.2d 1309, 1315-16 (7th Cir. 1991) 5

United States v. Lozoya-Morales, 931 F.2d 1216 (7th Cir. 1991) 6

United States v. Martinez, 922 F.2d 914 (1st Cir. 1991) 6

United States v. Matos, 907 F.2d 274, 275-76 (2nd Cir. 1990). 5

United States v. Moore, 484 F.2d 1284, 1287-88 (4th Cir. 1973) 4

United States v. Ogbeifun, 949 F.2d 1013, 1014 (8th Cir. 1991). 5

United States v. Wagner, 884 F.2d 1090, 1098-99 (8th Cir. 1989), cert. denied, 494. U.S. 1088 (1990) 5

Statutes

United States Sentencing Guideline {3C1.1 . . . . . .2, 6

In the Supreme Court of the United States

OCTOBER TERM, 1991

NO. _____

UNITED STATES OF AMERICA, PETITIONER

v.

SHARON DUNNIGAN, RESPONDENT

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SUMMARY OF ARGUMENT

Appellant's Petition for a Writ of Certiorari fails to demonstrate that an inconsistency exists between the various Circuits of the Court of Appeals when the decision of the Fourth Circuit is considered as prohibiting sentence enhancement based solely upon a jury finding a defendant guilty.

In absence of specific findings of perjured testimony by a convicted defendant, the Court of Appeals was compelled to find that the District Court unconstitutionally applied the sentencing guideline enhancement for obstruction of justice.

The appellant's Petition for a Writ of Certiorari should be denied based upon the consistency of the decision of the Fourth Circuit when record and decision in the instant case are compared with the decisions on the issue of enhancing a defendant's sentence for obstruction of justice pursuant to a jury's finding of guilt.

ARGUMENT

THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT'S METHOD OF ANALYSIS AND DECISION IS CONSISTENT WITH THE APPROACH TAKEN BY OTHER CIRCUITS

The government's argument for granting the writ of certiorari in this case is that the Fourth Circuit is in conflict with other circuits on the issue of whether the Constitution prohibits a court from making a sentence enhancement pursuant to United States Sentencing Guideline {3C1.1 if the court finds that the defendant committed perjury. No split exists because the Fourth Circuit's decision was specific to the particular set of facts involved. Thus, the Fourth Circuit's decision should be characterized as entirely consistent with the cases cited by the government to show a split.

This case differs from those cited by the government in support of its theory that there is a split among the circuits. In this case, the sentencing judge based his finding solely on the fact that the jury disbelieved Dunnigan's testimony:

> "This court finds this defendant was untruthful at trial with respect to material matters in this case. The defendant denied her involvement when it is clear from the evidence in this case as the jury found beyond a reasonable doubt that she was involved in the conspiracy alleged in the indictment, and by virtue of her failure to give truthful testimony on material matters that were designed to substantially affect the outcome of the case, the court concludes that the false testimony at trial warrants an upward adjustment by two levels."

Government's Petition at 4, n.l. (emphasis added). This is cryptic language. It does not affirmatively appear that the sentencing judge made an independent finding of perjury. Rather, the judge chose to rely solely upon the jury's disbelief of Dunnigan's testimony. Indeed, the Fourth Circuit based its decision on that assumption, stating in its reversal of the two-point enhancement:

> "Sentencing judges should not indiscriminately treat as a perjurer every convicted defendant who testifies in his own defense. . .Judges must constantly bear in mind that neither they nor jurors are infallible. A verdict of guilty means only that guilt has been proved beyond a reasonable doubt, not that the defendant has lied in maintaining his innocence."

United States v. Dunnigan, 944 F.2d 178, 185 (4th Cir. 1991) (quoting United States v. Moore, 484 F.2d 1284, 1287-88 (4th Cir. 1973))[1]. The fact that the sentencing judge's apparent basis for the two-point enhancement was the mere fact that the defendant testified on her own behalf distinguishes this case from all cases cited by in support of the apparent split as well as United States v. Grayson, 438 U.S. 41 (1978).

In Grayson, the United States Supreme Court held that the sentencing judge properly took into account the fact that he considered the defendant's testimony to be fabricated when he sentenced the defendant. Id. at 55. The sentencing judge in Grayson, however, had made a specific factual finding, independent of the jury's verdict, that the defendant had committed perjury. Id. at 44. Similarly, the sentencing court in each case that is ostensibly in disagreement with Dunnigan made an independent finding of perjury. United States v. Bautista-Polanco, 927 F.2d 14, 22 (1st Cir. 1991) (holding judge could independently gauge credibility of witnesses for purpose of sentence enhancement); United States v. Matos, 907 F.2d 274, 275-76 (2nd Cir. 1990) (affirming enhancement based on perjury committed at suppression hearing); United States v. Acosta-Cazares, 878 F.2d 945, 953 (6th Cir.) (holding enhancement proper when judge believes defendant has committed perjury), cert. denied, 493 U.S. 899 (1989); United States v. Contreras, 937 F.2d 1191, 1993 (7th Cir. 1991) (holding enhancement

[1] But see United States v. Craigo, 956 F.2d 65, 68 (4th Cir. 1992). The record in Craigo also is unclear, but the case appears to interpret Dunnigan as entirely precluding an upward adjustment based on the defendant's testimony, even with an independent finding of perjury. Id.

proper only upon judge's independent finding of perjury)[2]; United States v. Wagner, 884 F.2d 1090, 1098-99 (8th Cir. 1989) (affirming judge's enhancement based on his independent finding of perjury, as well as the jury's guilty verdict)[3], cert. denied, 494. U.S. 1088 (1990); United States v. Barbosa, 906 F.2d 1366, 1369 (9th Cir.) (affirming judge's enhancement based on his finding that the defendant's testimony was "pure fantasy"), cert. denied, 111 S.Ct. 394 (1990); United States v. Beaulieu, 900 F.2d 1537, 1541 (10th Cir.) (affirming enhancement because record showed clearly "that the sentencing judge disbelieved defendant's testimony"), cert. denied, 110 S.Ct. 3252 (1990) (finding sufficient evidence of untruthfulness in the record to merit a two point upward enhancement). Here, by contrast, the sentencing court based its enhancement purely on the fact that Dunnigan testified and that the jury appeared to have disbelieved her testimony. Thus, Dunnigan is entirely consistent with the approach taken by other circuits, as well as that embraced by the Supreme Court in Grayson.

The argument for Dunnigan's consistency is further bolstered by two cases from the First and Seventh Circuits. United States v. Martinez, 922 F.2d 914 (1st Cir. 1991); and United States v. Lozoya-Morales, 931 F.2d 1216 (7th Cir. 1991). In Lozoya-Morales the Seventh Circuit reversed a trial judge's two-point enhancement for obstruction of justice because he failed to make an independent finding of perjury. Lozoya-Morales, 931 F.2d at 1219. The First Circuit reached a similar conclusion in Martinez when it refused to force a trial judge to

[2] See also United States v. Jones, 950 F.2d 1309, 1315-16 (7th Cir. 1991), in which the Seventh Circuit rejected Dunnigan but failed to address whether the judge made an independent finding of perjury. Id.

[3] See also United States v. Ogbeifun, 949 F.2d 1013, 1014 (8th Cir. 1991) (rejecting Dunnigan, but only to the extent that it would prohibit an upward adjustment even with an independent finding of perjury).

make an automatic upward enhancement for obstruction of justice solely on the basis of a jury's guilty verdict after the defendant's testimony in his own defense. Martinez, 922 F.2d at 926.

In its Petition the government contends that United States Sentencing Guideline {3C1.1 does not require an upward adjustment every time a defendant testifies on his own behalf and is convicted and cites Lozoya-Morales and Martinez for that proposition. Government's Petition at 15, n.8. If this case is indeed identical to Lozoya-Morales and Martinez, then it fails even the standard the government itself has conceded, because it does require that the court give every convicted defendant who testifies in his own defense a two point upward adjustment.

In absence of expressed findings of specific perjured testimony, as is the case in this instance, the inevitable conclusion is that the sentencing court perceived the guidelines as mandating the two level enhancement solely upon the jury's verdict of guilty. Likewise, the government asserted during oral argument before the Court of Appeals "...that every defendant who takes the stand and is convicted should be given the obstruction of justice enhancement." Dunnigan, 944 F.2d 178, 183.

The Fourth Circuit was confronted with a sentencing record that simply alluded to perjured testimony and was presented with the government's argument that the enhancement was required for every
convicted defendant who testified had not alternative but to reach the conclusion that the rigidity of the sentencing guidelines could not be used to find an obstruction of justice enhancement.

Although there is detailed recitation of the facts presented

to the jury at the trial, there is no indication in the sentencing record as to which facts the jury believed or disbelieved in the defendant's and the government witnesses' testimony. The absence of those findings presents the possibility that the jury may have believed all or none of the defendant's testimony but still convicted her on a portion of the government's evidence which she did not attempt to address[4] or rebut.

It is important to note that the governments' evidence in its case in chief was solely the testimony of convicted co-conspirators who were testifying in order to earn credit for lenient sentences. There were no drugs, documents, photograph or recordings which would have corroborated their testimony and supported a perjury finding. The only hard evidence in the case came in the form of rebuttal testimony of a collateral crime which was recorded by an informant. The sentencing record made no analysis of the evidence upon which the enhancement was based and compelled the Court of Appeals to render an admonition against mechanistic application of the sentencing guidelines as advocated by the government during oral argument.

The deficient record and findings by the sentencing court renders this case inappropriate for consideration by this Court for a determination of the important issue of the constitutionality of the obstruction of justice enhancement for perjured testimony at trial.

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[4] The Court of Appeals in its review of the evidence characterized Dunnigan's testimony as a denial of everything. U.S. v. Dunnigan, 944 F.2d 178,181.

CONCLUSION

The lack of clarity of the record and the apparent consistency of the decision by the Fourth Circuit with the application of the obstruction of justice sentence enhancement provisions compels that Certiorari be denied by this Court.

Respectfully submitted,

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(3)

No. 91-1300

Supreme Court, U.S.
FILED
MAY 7 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA, PETITIONER

v.

SHARON DUNNIGAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1991

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UNITED STATES OF AMERICA, PETITIONER

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SHARON DUNNIGAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

Respondent offers only one reason why this case does not warrant further review: In her view, the Fourth Circuit did not hold unconstitutional the obstruction of justice enhancement in Sentencing Guidelines § 3C1.1 as applied to a defendant who commits perjury while testifying at trial. Instead, the Fourth Circuit simply held that the district court erred in basing its conclusion that respondent committed perjury solely on the fact that respondent testified and was convicted. Br. in Opp. 1.

That interpretation of the Fourth Circuit's decision is incorrect. Respondent can point to nothing in the Fourth Circuit's opinion supporting her position; instead, she relies entirely on a portion of the district court's remarks at sentencing. Br. in Opp. 3. Although we believe that respondent has misread the district court's

comments, it is the Fourth Circuit's decision that is now before this Court. And the judges of that court gave a detailed explanation why "[o]ur sense of justice requires us to disagree," Pet. App. 10a, with the holdings of seven other circuits that Sentencing Guidelines § 3C1.1 may constitutionally be applied to a defendant who commits perjury while testifying at trial. See Pet. App. 9a-15a.

The Fourth Circuit's subsequent decision in *United States* v. *Craigo*, 956 F.2d 65 (1992), makes clear that its holding in this case adopts the broad proposition that the Constitution forbids a district court from enhancing a defendant's sentence under Sentencing Guidelines § 3C1.1 for perjury. As the court wrote, *id.* at 68:

> Although we are of the opinion that the district court's conclusion that Craigo's testimony was ludicrous and perjurious is supported by the evidence and is not clearly erroneous, *United States v. Dunnigan* does not permit a district court in sentencing to enhance a guidelines sentence under Guideline § 3C1.1 for lying testimony by a defendant in denial of the charges against him because that guideline is an intolerable burden on the defendant's right to testify. [*United States* v.] *Dunnigan*, 944 F.2d [178,] 185 [(4th Cir. 1991)].

The decision in *Craigo* thus shows that the Fourth Circuit—which failed by an evenly-divided vote to rehear this case en banc—believes that its decision in this case flatly bars district courts from enhancing a defendant's sentence under Sentencing Guidelines § 3C1.1 for perjury.

As we explained in our petition, the question whether Sentencing Guidelines § 3C1.1 can constitutionally be applied in circumstances like the ones at issue in this case is a question that will arise with considerable frequency in federal criminal prosecutions. Because the Fourth Circuit is committed to its minority position, review by this Court is necessary in order to restore the uniformity that existed before the Sentencing Guidelines went into effect

For the foregoing reasons and those given in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

KENNETH W. STARR
Solicitor General

MAY 1992

(4)

No. 91-1300

Supreme Court, U.S.
FILED
JUL 8 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA, PETITIONER

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SHARON DUNNIGAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED FEBRUARY 10, 1992
CERTIORARI GRANTED MAY 26, 1992

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 91-1300

UNITED STATES OF AMERICA, PETITIONER

v.

SHARON DUNNIGAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOINT APPENDIX

TABLE OF CONTENTS [1]

	Page
Relevant district court docket entries	1
Relevant court of appeals docket entries	3
Transcript of sentencing hearing	5
Judgment and commitment order	38
Order allowing certiorari	43

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[1] The following items were printed in the petition appendix and are not reprinted herein: (1) the opinion of the court of appeals; (2) the corrected order denying rehearing and rehearing en banc, as well as the accompanying opinion dissenting from the denial of rehearing en banc; (3) the judgment; and (4) the mandate.

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

No. 89-36

UNITED STATES OF AMERICA, PLAINTIFF

v.

SHARON DUNNIGAN, DEFENDANT

RELEVANT DOCKET ENTRIES

DATE	NR	PROCEEDINGS
Mar 07	1	INDICTMENT (offense occurred summer 1988). ns
		• • • •
01-02-90	(**)	JURY SELECTION: COPENHAVER/JUDGE; STEINKE/REPORTER. ras
01-03-90	(**)	JURY TRIAL (DAY 2): COPENHAVER/JUDGE; STEINKE/REPORTER. ras
		• • • •
01-04-90	(**)	JURY TRIAL (DAY 3): COPENHAVER/JUDGE; STEINKE/REPORTER: ras
01-04-90	(30)	VERDICT: Finding deft guilty of the charge contained in indict. ras
01-08-90	(31)	ORDER (2508): Re trial before court and jury 01-02-90 thru 01-04-90; adjudging deft GUILTY as charged in 1-ct indict; deft stands convicted of 1 violation of 21 U.S.C. 846; directing USP to conduct PSI; disp set 03-26-90 @ 1:15 p.m.; deft has until 01-11-90 to file post-trial mtns; denying deft's mtn for release on bond; deft rem to cust of USM pending sent. cc: Judge, deft, atys, USM & USP (EOD 01-09-90) ras
		• • • •

DATE	NR	PROCEEDINGS
05-21-90	(**)	SENTENCING: COPENHAVER, JUDGE; STEINKE, REPORTER. kag
05-23-90	(43)	JUDGMENT INCLUDING SENTENCE UNDER THE SENTENCING REFORM ACT (2508): sent held 5/21/90; as to ct 1, 51 mos impr; 3 yrs super rls; $50 sp assmt; costs of custody & supervision are waived. cc: Judge, deft, atys, USM & USP. (EOD 5/23/90)
05-23-90	(44)	CONDITIONS OF PROBATION AND SUPERVISED RELEASE. kag
05-30-90	(45)	NOTICE OF APPEAL by Deft. (EOD 06-01-90) ras

• • • •

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 90-5668

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

SHARON DUNNIGAN, DEFENDANT-APPELLANT

Appeal from the United States District Court for the Southern District of West Virginia, at Charleston
John T. Copenhayer, Jr., District Judge
(CR-89-36)

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
6/7/90	Criminal case docketed. (mst)
	• • • •
4/12/91	Oral argument heard. Courtroom Deputy: vsl. [90-5668] (vsl)
8/30/91	Published, authored opinion filed. [90-5668] (skt)
8/30/91	Judgment order filed. Terminated on the Merits after Oral Hearing; Affirmed (in part) and Reversed (in part); Written, Signed, Published. KKH, Authoring Judge; JDP; RLW. [90-5668] (skt)

DATE	PROCEEDINGS
9/10/91	Motion filed by Appellee US to extend time to file petition for rehearing en banc until: 10/14/91 [1551037-1]. [90-5668] (mst)
9/10/91	Clerk order filed granting motion to extend time to file pet reh [1551037-1] until: 10/14/91. Copies to all counsel. [90-5668] (mst)
10/15/91	Petition filed by Appellee US for rehearing. Number copies filed: 15 [1565648-1], for suggestion for rehearing in banc. Number of copies filed: 15 [1565648-2] [90-5668] (mst)
10/30/91	Response [1572167-1] to motion for rehearing [1565648-1], motion for suggestion for reh in banc [1565648-2] filed by Appellant Sharon Dunnigan. [90-5668] (mst)
	• • • •
11/13/91	COURT ORDER filed denying motion for rehearing [1565648-1], denying motion for suggestion for reh in banc [1565648-2] Copies to all counsel. [90-5668] (mst)
	• • • •
11/15/91	Corrected order filed acting on denying motion for rehearing [1565648-1], denying motion for suggestion for reh in banc [1565648-2]. [90-5668] (mst)
11/20/91	Mandate issued. [90-5668] (rm)
	• • • •
11/27/91	DISSENT (to order) filed by Judge Wilkins to correcting order filed 11/15/91 re denial of appellee's petition for rehearing with suggestion for rehearing in banc. Copies to all counsel [90-5668] (mst)
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

Criminal No. 2:89-00036

May 21, 1990

UNITED STATES OF AMERICA

v.

SHARON DUNNIGAN, DEFENDANT

TRANSCRIPT OF PROCEEDINGS
FINAL DISPOSITION

[Filed Nov. 13, 1990]

BEFORE THE HONORABLE JOHN T. COPENHAVER, JR.
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the United States:

AMY LECOCQ
Assistant U.S. Attorney
Charleston, West Virginia

For the Defendant:

DOUGLAS MILLER
Attorney
Charleston, West Virginia

[2] PROCEEDINGS

THE CLERK: The court calls the case of *United States of America versus Sharon Dunnigan*; Criminal Action No. 2:89-00036. Will the parties please note their appearances for the record.

MS. LECOCQ: Amy Lecocq on behalf of the United States.

MR. MILLER: Douglas Miller on behalf of Sharon Dunnigan.

THE CLERK: Will the parties please come forward.

(The defendant was sworn.)

THE COURT: Mr. Miller, have you been over the Probation Department's presentence report?

MR. MILLER: Yes, sir, I have, Your Honor.

THE COURT: Have you gone over it thoroughly with Miss Dunnigan?

MR. MILLER: Yes, sir, I have.

THE COURT: Can you tell me whether or not she understands it?

MR. MILLER: Yes, sir, she does.

THE COURT: Miss Dunnigan, have you read the Probation Department's presentence report in your case?

THE DEFENDANT: Yes.

THE COURT: In its entirety?

THE DEFENDANT: Yes.

[3] THE COURT: Have you gone over it thoroughly with Mr. Miller as well?

THE DEFENDANT: Yes, I have.

THE COURT: Did he explain to you everything in that report that you didn't already understand when you read it yourself?

THE DEFENDANT: Yes.

THE COURT: Is there anything at all about that report that you don't understand?

THE DEFENDANT: Well, for one thing, I don't understand how could I be at work on the 15th and before a warrant was—

THE COURT: Could you speak up a bit?

THE DEFENDANT: I'm hoarse from playing at the rec room.

THE COURT: Yes.

THE DEFENDANT: But they say that I absented myself after a warrant was put out for me.

THE COURT: Yes.

THE DEFENDANT: I was at work on the 15th and the warrant did not come out until the 31st.

THE COURT: All right. I understand that you may have some objection to the report in that regard, but my question of you now is whether or not you understand what is in the report.

THE DEFENDANT: Yes, I understand.

[4] THE COURT: All right. Now then, Mr. Miller, are there any corrections, additions, or changes that ought to be made to that report?

MR. MILLER: No, sir.

THE COURT: Do I understand then that the report is in all respects accurate?

MR. MILLER: Yes, sir, that is, the amended report we have discussed at length.

THE COURT: The amended report?

MR. MILLER: Yes, sir.

THE COURT: And that is, do I understand that after the report was first drafted, that there was some changes made in it?

MR. MILLER: Yes, sir, Your Honor.

THE COURT: I want you to look at this report and tell me whether or not this report is in all respects accurate.

MR. MILLER: Yes, sir.

THE COURT: Is that the report to which you are referring?

MR. MILLER: Right. The record would note that the document just handed back to you has [*sic*] marked also revised 5-11-90, so this is not the original. This is a revised report.

THE COURT: Very good. Now then, does the government have any changes to suggest?

[5] MS. LECOCQ: None beyond what is contained in the addendum, Your Honor.

THE COURT: That is, nothing beyond what is contained in the government's objections—

MS. LECOCQ: Yes, sir.

THE COURT: —that are set forth in the addendum?

MS. LECOCQ: Yes, sir.

THE COURT: I'll come back to that in a moment. Let me ask you, Ms. Dunnigan, whether or not you agree that this report, except for that which is set forth in the addendum, I'm not asking you about that now, do you agree that this report is in all respects accurate as prepared by the probation officer or did you have some question about that one matter that you mentioned to me earlier in this hearing?

THE DEFENDANT: I do have questions about what I mentioned, but I read all of this and what they said about me and, you know, my children and everything, most of that is true. But the other stuff, I don't really know.

THE COURT: The other stuff, now what is that? What are you speaking of?

THE DEFENDANT: I just don't understand it at all.

THE COURT: You don't understand what at all?

THE DEFENDANT: I don't understand none of Miss Brown's testimony.

THE COURT: You don't understand what?

[6] THE DEFENDANT: Miss Brown's testimony.

THE COURT: Let me ask you this. Miss Brown, of course, testified at the trial. That's what you are talking about.

THE DEFENDANT: Yes.

THE COURT: Now, the court has heard that matter and I am conversant and fully advised as to what was stated by Ms. Brown. My question of you now is about that which is contained in this report—

THE DEFENDANT: Right.

THE COURT: —and whether it is accurate or not?

THE DEFENDANT: Yes.

THE COURT: And if there is some part of it that is inaccurate, I want you to point it out to me. So far you pointed out to me what I believe to be your concern regarding the suggestion that you may have obstructed justice because you were not found shortly after the indictment was returned in the case.

THE DEFENDANT: And I would like to know where they get the 16 ounces, 17 ounces of cocaine.

THE COURT: We'll come back to that in a moment then and I'll take that up with you, too. Now, anything else besides those two?

THE DEFENDANT: No, not that I can think of at the moment.

[7] THE COURT: All right. Now then, but you've been through the report. You've read it and you understand it?

THE DEFENDANT: I've read it, yes.

THE COURT: With regard to the question of your having had an arrest warrant issued for you on March 31 but your not being arrested until October 3, 1989, the magistrate then detained you on the basis that you posed a risk of flight, and once the case was concluded, the court declined bond to you, although in reality the court did so based on what the court perceived to be your danger to the community because of your propensity to sell drugs. The court at the same time concluded that you were a risk to flee, but that was really done on the basis of both the significance of the charges that have been

proved against you in keeping with the evidence which the court heard at trial, as well as the findings that the magistrate had made earlier on that question of your risk to flee.

Consequently, I'm not particularly concerned with pursuing that phase of the obstruction of justice aspect of this sentencing hearing, unless the government wishes to pursue it further.

MS. LECOCQ: Your Honor, insofar as the obstruction of justice or impeding the proceedings adjustment to the guidelines, it is the position of the United States that the defendant testified untruthfully at trial. So regardless of whether or not she absented herself or not, the two points [8] would—would be imposed by the court under the government's theory. So if the court agrees, there is no reason to pursue the matter in dispute.

THE COURT: That is, the matter in dispute being whether or not obstruction of justice should be found on the basis of her failure to appear.

MS. LECOCQ: Yes, Your Honor.

THE COURT: If that's the case, then I think we can put that matter behind us and go on to the other prong of this matter that has been referred to by Miss Lecocq having to do with whether there is an obstruction of justice by reason of the failure of the defendant to testify truthfully on matters of substance that were material at trial.

Now then, enwebbed in the latter is in part the quantity of drugs that were involved and you raise a question about that as to whether or not sixteen ounces is appropriate. The sixteen ounces is calculated on page 2 by the probation officer and it seems to me that this was largely presented at trial as well. It is shown that on three trips to Cleveland, you were accompanied by Freddy Harris and you purchased a total of six ounces at the least on those three trips. You were accompanied by John Dean on two occasions, that is two trips and you purchased a total of four ounces on those trips. And

that you made at least three trips by bus alone to purchase a total of at least six more ounces. So that the total comes to [9] sixteen ounces and yields 453.6 grams. Now then, I understand you to dispute whether sixteen ounces is the proper figure; is that correct?

THE DEFENDANT: That's correct, and I don't see how that you could use their testimony and believe that I actually went with them or even went to Cleveland at all to purchase cocaine.

THE COURT: Yes.

THE DEFENDANT: There's no proof.

THE COURT: The jury seemed to believe their testimony.

THE DEFENDANT: There's what?

THE COURT: The jury seemed to believe that testimony, didn't they?

THE DEFENDANT: They seemed to believe it, yes.

THE COURT: And that's why you were found guilty.

Let me ask the government before we proceed further with that, what the government's view is of the total involved at least as set forth on page 2. I don't want to get in at this moment as to other conduct that may have been involved with her daughter, which is referred to in the government's objections, as I recall. I wanted to focus on this matter right now.

MS. LECOCQ: Yes, Your Honor. It would seem appropriate for the court to consider the other quantity of the [10] crack cocaine only insofar as the court might deem that it would be appropriate to sentence within the range at a particular point or for a basis for a departure upward. In other words, it's not so clear from the evidence that that cocaine was part of the same conspiracy as the cocaine referenced in paragraph 8 as to include it in the drug quantity.

THE COURT: Now, paragraph 8, could you focus on that for me and provide such support as you may have for its calculation.

MS. LECOCQ: Yes, Your Honor. In fact, this was a matter of dispute between the parties when the presentence report was first prepared, and we caused to have the entire trial transcript provided by your court reporter, and I have reviewed the trial transcript and submitted these quantities. They come from the testimony of Freddy Harris, John Dean, and others who support the quantities. I have submitted to the probation officer transcript references, and if you would like me to read those into the record, I will at this time. The three trips to Cleveland are supported in the transcript at pages 12 through 15, 66 through 67, and page 146.

THE COURT: You are speaking of the three trips to Cleveland accompanied by Freddy Harris?

MS. LECOCQ: Yes, Your Honor. That's the six ounces minimum that the court referred to. The two trips with John [11] Dean are referenced—those are four ounces, two ounces a trip, referenced at pages 87 through 90 and page 100 of the trial transcript.

The trips alone on the bus to Cleveland, the references for those trips and, again, it's a minimum of six ounces. The transcript references are page 68, 146, and 174. These transcript pages have been provided both to the probation officer and to the defendant on prior occasion, Your Honor.

THE COURT: And those latter three trips by bus were by the defendant alone?

MS. LECOCQ: Yes, Your Honor. Those are three trips where—and, again, these are minimums. She returned with one ounce, two ounces, and three ounces, making a total of six ounces minimum for trips that she took to Cleveland on the bus and traveled alone.

THE COURT: Now then, the initial question would be isn't it the fact that that was the testimony at trial?

MR. MILLER: No, sir, it isn't, Your Honor. I'm sorry.

THE COURT: Go ahead.

MR. MILLER: Actually—

THE COURT: Take those by item, if you would.

MR. MILLER: Well, the—and I have not reviewed the transcript.

THE COURT: Well, then, I think you ought to review the [12] transcript before you conclude that is inaccurate. The basis of that which Mrs. Lecocq just stated has been outlined by her with specificity and it seems to me before you attack it, you ought to review that which is stated.

MR. MILLER: Could I have a few minutes to do that, Your Honor?

THE COURT: How much time do you need to review that matter?

MR. MILLER: I can do it in five minutes.

THE COURT: We'll be in recess for ten minutes.

(At 2:35 p.m. there was a recess until 2:53 p.m.)

THE COURT: If the parties will return to the bench.

After a review of the transcript, tell me whether or not the parties are in agreement that the sections of the transcript referred to by Ms. Lecocq do indeed support the sixteen-ounce contention contained in paragraph 8 of the presentence report.

MR. MILLER: No sir, Your Honor, they don't. Upon examination of the transcript, I find that in reference to John Dean, Miss Lecocq represents that he went with Mrs. Dunnigan twice to Cleveland and on each occasion picked up two ounces. The testimony of Freddy Harris on page 67 says John Dean only went once.

THE COURT: All right. Anything else?

MR. MILLER: Yes, sir. The testimony of Andre [13] Charlton on page 146 of the transcript could very well be a double count because Mr. Harris testified that Mrs. Dunnigan brought back some ounces of cocaine on her own making trips by herself, and I think on one occasion she brought back one ounce allegedly and on the second occasion two ounces, the third occasion three ounces, and the fourth occasion he can't remember as to what the ounces was. But at any rate, Andre Charlton's testimony

does not indicate upon which one of those occasions that he participated with Freddy Harris in the sampling and the rebagging of the cocaine. In other words, we don't know what specific trip Mr. Charlton's testimony represents. However, I don't think it was an additional trip, other than the trips that Mr. Harris testified to. Consequently, the Charlton representation of one, two to four ounces, I think he said, that representation is a double count by his standard.

In addition, Your Honor, the testimony of Freddy Harris at trial was that he never did at any time weigh any of the alleged cocaine brought back by Mrs. Dunnigan. So that means that any quantity that we can arrive at would be sheer guesswork.

THE COURT: Miss Lecocq.

MS. LECOCQ: Your Honor, this is the first that I have heard that the defendant disputed the quantities that were testified to at trial.

[14] MR. MILLER: You Honor, that's not true. I filed an objection to the first set of presentence reports.

MS. LECOCQ: If I might continue, Your Honor, so that the court understands the full history.

THE COURT: Go ahead.

MS. LECOCQ: The probation officer prepared a presentence report based upon information that had been provided to him by the United States and by the defendant. That presentence report contained roughly these same quantities of cocaine. The defendant objected to the quantity of cocaine, although he could offer no—she could offer no alternative quantity of cocaine, and insisted that at the government's expense we prepare a transcript of the trial proceedings to confirm the quantities. Your court reporter prepared that transcript and the sentencing was continued in order that we might check these quantities of cocaine. I did that, Your Honor, and prepared the April 17th letter which was referenced earlier. I telephoned the defendant's counsel on several occasions in order to determine whether he had any dispute with these

quantities. He never returned my call. I received the addendum which indicated that he had no dispute with those quantities that were testified to at trial. And this is the first that I have heard that the defendant disputes that these quantities were testified to by witnesses at trial.

MR. MILLER: Your Honor—I'm sorry.

[15] MS. LECOCQ: In an attempt to address page 146, the testimony of Andre Charlton, it is clearly not an overlapping incident. The two trips to Cleveland with Freddy Harris were two trips that Freddy Harris took with the defendant in a private automobile. The discussion on page 146, as I am just now looking at it, appears to be a reference to one of the trips where Andre Charlton picked the defendant up at the bus station. And I'm not sure what the objection was to earlier concerning Freddy Harris's testimony about trips that John Dean may have taken.

MR. MILLER: He indicates—Freddy Harris indicated that John Dean took one trip, that's page 67, with Mrs. Dunnigan.

THE COURT: It seems to me that all of this which should have been done before we reached this point, Mr. Miller.

MR. MILLER: Yes, sir.

THE COURT: Once again, you have not timely informed the court of your position. What you stated in this presentence report as it appears in the addendum was that the defendant, through her counsel, acknowledges the drug amounts reported in the presentences report are those that were testified to during the trial. The defendant, however, continues to maintain her innocence.

It does not seem to me for that which is stated that you dispute those amounts, but rather that you agree to them. [16] In addition to that, I noticed at the outset today when the court asked you whether this presentence report was in all respects accurate, you said

yes, and you no more than say that, then once the question arises, you take an entirely different position. What you have done is simply waste the court's time today. It would have been so simple if you had an objection and if you had done your homework, to have made a note of precisely what it was so that the court could have dealt with it beforehand.

As has been pointed out, we have the luxury of having the transcript. We have that because an objection was made apparently at some stage as to the quantities. Once you get the material and you learn from the government that the position is supportable, you acknowledged that it is accurate, and then you've no more than said that, both in the addendum as contained in the presentence report and before the court here today, until you launch an attack with respect to those very figures.

If all court proceedings were handled this way, there would be nothing but chaos, and it is not due to anything other than the fact that you have chosen not to prepare yourself apparently for this matter until the last minute, at best.

MR. MILLER: Your Honor, that's—

THE COURT: Now, I am going to hear what you have to say, even though you are choosing a method of doing it that is [17] wasting everyone's time, all of which could have been conserved had you simply informed others of what your objection is. Now, I understand what your objection is now. I will retire in a moment after hearing more specifically from the parties doing that which the court expected the probation officer to do if you had given the probation officer an opportunity to do it. And then having done that, I will review the transcripts and make a determination.

Now, let's start at the beginning. First of all, with respect to that which is said to be the Freddy Harris related testimony, the purchase of at least six ounces on three trips, that is, on several trips I should say, on what pages do you rely for that?

MS. LECOCQ: Your Honor, the pages that I had cited were page 12 through 15, 67 through 66—

THE COURT: 67 through which?

MS. LECOCQ: I'm sorry, 66 through 67.

THE COURT: All right.

MS. LECOCQ: —and 146. Your Honor, I have not had the opportunity to double-check these pages. I assume they are accurate, but if there is some question that is raised about them, I will certainly take a look at them again. Would the court like the trips with John Dean?

THE COURT: Please.

MS. LECOCQ: Page 87 through 90 and also page 100.

[18] THE COURT: All right.

MS. LECOCQ: The trips alone on the bus to Cleveland, page 68, 146, and 174.

THE COURT: Now then, on what page of the transcript do you rely for that which is served by the government that as not being true?

MR. MILLER: Page 67 for the proposition that John Dean only took one trip to Cleveland as opposed to two.

THE COURT: All right.

MR. MILLER: And page 146, the testimony of Andre Charlton, it is not indicated which one of these trips it is of the three or four that Freddy Harris testifies that Mrs. Dunnigan went to Cleveland for him, but Andre Charlton indicates that he witnessed one of those trips, at least the proceeds of one of those trips.

THE COURT: All right. That has to do with the Harris trips?

MR. MILLER: Yes, sir.

THE COURT: The Dean trips?

MR. MILLER: That has to do with Harris trips alone as opposed to Harris—

THE COURT: Let's take them one at a time. First of all, tell me what it is that you rely upon with regard to the Harris testimony as to several trips which the government says yielded six ounces at the least?

[19] MR. MILLER: On that, I have no—that's Harris trips with Harris, I have no dispute with that.

THE COURT: Harris trips, that is, the defendant was accompanied by Harris on those trips.

MR. MILLER: Yes, sir.

THE COURT: There's no dispute about the six ounces then?

MR. MILLER: No, sir.

THE COURT: All right. The Dean trips, four ounces.

MR. MILLER: All right. There's a dispute of two of those ounces because Harris testifies Dean only made one trip, page 67.

THE COURT: All right. And that covers the Dean trips then?

MR. MILLER: Yes, sir.

THE COURT: All right.

MR. MILLER: The Charlton testimony, 146.

THE COURT: All right.

MR. MILLER: We don't know what to attribute those quantities to, first trip, second trip, third trip, by Dunnigan alone.

MS. LECOCQ: Is there a dispute to the six ounce minimum?

MR. MILLER: Where?

MS. LECOCQ: On the trips alone on the bus to [20] Cleveland?

MR. MILLER: Yes.

MS. LECOCQ: And you would prefer to have what?

MR. MILLER: I believe Freddy Harris's testimony is that the first time she went alone, she brought back one ounce; the second time, she brought back two; the third time, she brought back three.

MS. LECOCQ: Then we are in agreement, Your Honor.

MR. MILLER: Okay, all right.

MS. LECOCQ: Six ounces minimum.

MR. MILLER: Right, and you have a question mark there for the fourth because he didn't know how much that was. No dispute as to that.

THE COURT: Is it agreed then to six ounces attributable to the Harris trips for the defendant and six ounces attributable to the defendant traveling by bus alone are accurate?

MR. MILLER: Yes, sir.

THE COURT: That leaves us then with the two Dean trips and four ounces involved there. It is your position Harris says that notwithstanding what Dean said, only one trip was made by Dean with the defendant.

MR. MILLER: Yes, sir.

THE COURT: Now, what was the quantity that would be agreed upon with respect to that one trip?

[21] MR. MILLER: The government alleges that on each occasion, it was two ounces. If we can settle on the fact that only one trip was made, then I suppose two ounces might be accurate.

THE COURT: Now then, as I understand it, two ounces is in dispute to do with the Dean trip. On what does the government rely to counter that which Mr. Miller has pointed out to the effect that Freddy Harris says that Dean made only one trip, even though Dean said he made two?

MS. LECOCQ: Your Honor, John Dean testified that he made two trips and I believe the transcript pages that I have cited to the court contain his testimony concerning those two trips.

THE COURT: 87 to 90 and page 100?

MS. LECOCQ: Yes, sir.

THE COURT: So it's a question of who is correct as between the two, that is, Dean or Harris. Is that what it boils down to?

MS. LECOCQ: Yes, Your Honor. It appears, and although I hadn't looked at this earlier, that Harris merely responds how many times John went for me? Question, yes. And he says once. But the testimony of John Dean

clearly describes two separate trips in some detail. And apparently there's—there would be only an issue then if the court would believe John Dean and his detail on the two trips, or just in a series [22] of questions and answers, Freddy Harris's statement that the defendant and Mr. Dean went once.

THE COURT: Is it agreed that the only areas to which the court need look in the testimony are those that have been pointed out thus far by the parties?

MR. MILLER: Yes, sir.

THE COURT: Pages 87 and 90, page 100, and page 67. Does that cover it?

MR. MILLER: Page 146, Your Honor. That's Charlton.

MS. LECOCQ: That referred to the matter that you said we don't have a dispute on.

MR. MILLER: Oh, okay, right.

THE COURT: So that's no longer in issue, correct?

MR. MILLER: Yes, sir.

THE COURT: So again, the pages the court needs to focus on 87 to 90, page 100, and page 67.

MR. MILLER: Yes, sir.

THE COURT: I'll take just a moment to do that now. (Pause.)

MS. LECOCQ: Excuse me, Your Honor. I think that the pages I cited to the court are the pages that actually reference quantities, and the trips are discussed in some pages before, for example, before page 87, and I might direct the court to some earlier pages as far as understanding the context of those quantities that are cited in the transcript pages.

[23] THE COURT: Well, I think the parties are in agreement that the trips involved two ounces and the question is how many trips were taken insofar as John Dean is concerned.

MR. MILLER: Right.

THE COURT: So I don't think there is any dispute about the quantity in that respect. As to the number of

trips, to what pages should the court be directed besides 67 as cited by the defendant?

MS. LECOCQ: Actually, Your Honor, the testimony of Mr. Dean begins on page 83 wherein he begins to tell about the trip, and it's beginning with the first question on that page.

THE COURT: All right. How far does that extend?

MS. LECOCQ: I believe that concludes at page 90, Your Honor.

THE COURT: 83 to 90.

MS. LECOCQ: Yes, sir. And then it again begins—there's some testimony on page 101—

THE COURT: All right.

MS. LECOCQ: —and continuing there for several pages, Your Honor.

THE COURT: Now, give me the cities you want me to review that have to do with the subject matter.

MS. LECOCQ: 83 through 90, 101—I believe it's 101 through 103, Your Honor.

THE COURT: What about 100?

[24] MS. LECOCQ: We best pick that up, 100 to 103.

Your Honor, there's—I'm sorry to interrupt the court again. I hadn't looked for this previously. On pages 115 and 116, defense counsel questions Mr. Dean on this very subject, and the court may want to look at page 115 to 116.

THE COURT: All right. Now, does that cover it?

MS. LECOCQ: Yes, sir.

THE COURT: And do you have anything further?

MR. MILLER: No, sir.

THE COURT: All right. We'll be in recess for about ten minutes.

(At 3:15 p.m. there was a recess until 3:55 p.m.)

THE COURT: Do the parties have anything further on the issue of whether there would have been one or two trips of two ounces each by the defendant with John Dean?

MR. MILLER: I have nothing further, Your Honor.

MS. LECOCQ: No, Your Honor, except to state in reviewing the transcript, it seems clear that Mr. Dean describes in some detail the two trips that he took and distinguishes two separate trips to the court in his sworn testimony, and we would ask the court to credit his testimony.

THE COURT: And further aside from that matter, is there any other dispute in the presentence report that needs to be resolved?

MR. MLLER: No, sir, Your Honor, I have nothing [25] further.

MS. LECOCQ: No, Your Honor.

THE COURT: I suppose that we do have the question, however, as to the truthfulness of the defendant's testimony at trial on material matters, and I will ask whether the parties have anything further than that which is already before the court on that issue?

MS. LECOCQ: Your Honor, I think we have articulated our position satisfactory.

MR. MILLER: Your Honor, we have nothing to add to that, except for the fact that even though the jury did find the defendant guilty, she still maintains that she made no false representation at trial. Of course, that resides purely with the discretion of the court, in the sense that one has the freedom to speak to defend themselves in trials, and if that were not the case, then perhaps future defendants, including this one, would have foregone their right to testify in their own behalf, and I think to do that would be a miscarriage in terms of future defendants and this one.

THE COURT: Thank you.

And, again, there is one lingering matter and that is this. The government in its objection suggests that the court should consider departure for the reasons set forth in the objection as noted in the addendum. The reference is to Wynema Brown's testimony that she had observed the defendant's [26] daughter make crack cocaine from

cocaine powder involving a quantity of roughly 100 grams, and that that cocaine was produced for the defendant by the defendant's daughter. Let me ask whether the parties have anything further to develop on that departure issue. First, the government?

MS. LECOCQ: Your Honor, I had referenced several pages of the trial transcript, pages 174 through 177, where Ms. Brown's testimony appears, and it's clear from the testimony there that the defendant is supplying her daughter with the powder cocaine in order to make crack cocaine. Once the crack cocaine was manufactured, she retrieved the crack cocaine from her daughter and then parceled out various amounts in order for her daughter to sell and distribute the crack cocaine.

MR. MILLER: Your Honor, first of all, I would note that that testimony was allowed under similar acts, under the similar acts doctrine, and also I would call the court's attenion to the probation report.

THE COURT: At what, sir?

MR. MILLER: To the presentence investigation, presentence report.

THE COURT: Yes.

MR. MILLER: It indicates that the probation officer, Miss Brown—does not find Miss Brown to be credible. Even though the defendant in this case was convicted, we don't know that it was on the basis of credibility of the testimony of [27] Miss Brown. I would suspect and I'm sure the court would concur in some degree that the major testimony against Miss Dunnigan was Freddy Harris.

THE COURT: That what, sir? You expected something in some degree, what were you saying?

MR. MILLER: I would expect that in some degree the court might, having set through the trial, find that the most damaging testimony in the trial was presented by Mr. Dean, Mr. Harris, and Mr. Charlton. And, consequently, taking into consideration that Miss Brown's testimony came in as similar acts, that the court should

not consider an upward departure solely on the basis of Ms. Brown's testimony.

THE COURT: Thank you.

MR. MILLER: Your Honor, may I address the court on that matter?

THE COURT: Just a moment, please.

Go ahead.

MR. MILLER: Your Honor, I would call the court's attention to a letter that I received, hand delivered today at one o'clock. It's dated May 21, 1990. It's addressed to the judge of this court, in which the matter of Miss Brown's testimony is raised for the first time to my knowledge. The court addressed earlier some matters of consideration—

THE COURT: I'm not following you, sir. I have the letter of May 21, 1990, and I take it this is the rather brief [28] letter that Ms. Lecocq has addressed to the court with a copy to you under today's date. Is that the letter?

MR. MILLER: Yes, that's the letter.

THE COURT: And it seems to me that the government's request for departure is contained in the addendum to the presentence report.

MR. MILLER: Yes, sir, it is.

THE COURT: And that's under date of May 11—

MR. MILLER: Yes, sir.

THE COURT: —1990. So I am not satisfied that it is correct to say that the government is just now raising this today.

MR. MILLER: No, sir, Your Honor, perhaps that is incorrect, but you will notice attached to that letter is three or four pages of transcript. This is the first time I've seen that.

THE COURT: Well, just a moment. I don't recall having those transcript pages attached to the court's letter. Are you sure they were attached?

MR. MILLER: Yes, sir, they were.

THE COURT: Yes, I had them. I did not realize they were a part of the letter. And as I understand it, what you are complaining about is you only got the backup material of the transcript today.

MR. MILLER: Yes, sir, Your Honor.

[29] THE COURT: All right.

MR. MILLER: I had not seen any part of that transcript until today.

THE COURT: But it's from the trial transcript.

MR. MILLER: Yes, sir.

THE COURT: Anything further on that matter?

MR. MILLER: No, sir.

MS. LECOCQ: Your Honor, I would refer counsel as well to an April 17, 1990 letter to the probation officer which I copied to the defendant, which details also the testimony of Wynema Brown. The transcript pages were provided today merely to clarify her testimony, and those transcripts have been available to the defendant since they were produced.

MR. MILLER: Your Honor, may I ask the court. I could have prepared myself better for what happened here today and saved the court considerable amount of time had I had those transcripts. I was never notified to my knowledge that the transcripts were ready or that I could receive them. It's been represented to the court that on a prior occasion, I insisted at the state's expense that the transcript be reproduced. That is not true as I recall it, Your Honor. I think I recall asking for the pages of certain testimony. I did not—I did not request the entire transcript. I have not seen the entire transcript. As a matter of fact, no one has even offered me the entire transcript. Now, perhaps if that is the case, maybe [30] the United States has a cover letter or some such thing which would let me know that it was sent because I don't recall having seen it.

MS. LECOCQ: Your Honor, the transcripts were prepared as a result of the meeting that Mr. Casey, Mr. Miller, and I had concerning the presentence report. It

was determined at that meeting that there was only one way to resolve any conflicts we had. That was to get the trial transcript and review the testimony of the witnesses. I don't know whether or not Mr. Miller obtained a copy of the trial transcript. I did and I had it available to me. I assumed that he had his available to him or that he would know to ask for it when he started receiving letters from me citing transcript pages.

Regardless of that, Your Honor, we were all present at the trial. We don't need the trial transcript to recall the essence of Miss Brown's testimony, and that was as I have so stated.

THE COURT: All right. Is there anything further on the proposed basis for departure having to do with the Wynema Brown testimony as to the defendant's cocaine involvement with her daughter?

MR. MILLER: No, Your Honor, nothing further.

THE COURT: I should say cocaine base involvement with her daughter. Anything further on that?

MS. LECOCQ: No, Your Honor. Just to state that the [31] government is taking this conservative approach under—arguably those amounts could have been figured under the drug quantity table. We are satisfied to have court consider them as it chooses, either to decide within the range or for an upward departure.

THE COURT: If there's nothing further on that matter.

Now, insofar as the timing of the transcript in the hands of the defendant is concerned, are you prepared to conclude sentencing at this time?

MR. MILLER: Yes, sir, I am.

THE COURT: So that is there anything further to be developed by the parties in any respect regarding this matter?

MR. MILLER: No, sir, there isn't.

MS. LECOCQ: No, Your Honor.

THE COURT: Are there any other objections of which the court needs to take account?

MS. LECOCQ: No, sir.

MR. MILLER: No, sir.

THE COURT: With respect to the issue of whether there would have been one or two trips by the defendant with John Dean, the court observes that at trial, John Dean testified as to two specific trips. The trips are described in some detail in that on each occasion, John Dean and the defendant went to an individual whom John Dean thought to be the defendant's brother to obtain the cocaine at Cleveland.

[32] On cross-examination of John Dean, he is inquired of by the defendant—one moment—at pages 115 and 116 of the transcript respecting the Cleveland involvement in a trip or trips by the defendant with John Dean. Mr. Miller asks Mr. Dean about his grand jury testimony in that regard and the witness John Dean answers, "Like I said, the only time I remember driving is when I drove there—oh, she drove—she drove with Freddy one other time. She rode with Freddy one other time."

Then the witness is asked, "Does that indicate that you drove up there one time or two?"

The witness then answers, "It should indicate that I drove there one time is how many times I drove up here."

And at that point, Mr. Miller says, "Pardon?"

And the answer then is, "I said it should indicate that I drove there twice because that's how many times I drove up there."

The witness indicated some uncertainty at that stage as to whether it was once or twice, and when one refers to the grand jury testimony, one finds that the witness is only referring to a single trip. In his grand jury testimony when it's viewed in a larger context from page 9 through page 16, the witness notes that the source of cocaine in Cleveland was suppose to be the brother of one of the persons that, you know, went to Cleveland to purchase it.

[33] The question then was asked, "Was that person that went to Cleveland Sharon Dunnigan?" And he answers yes.

But his earlier answer to the question who was his source of cocaine in Cleveland was in total, Answer, "I can't remember his name. I only seen him one time, but he was suppose to be the brother of one of the persons that, you know, went to Cleveland to purchase it." The witness notes there that he saw him only one time, and yet in his trial testimony, he notes on each occasion that he purchased the cocaine from this same individual. Similarly, in his grand jury testimony, there is no mention of a second trip, only the travel to Cleveland on one occasion.

When the court considers that grand jury testimony, along with not only Mr. Dean's testimony on both direct and cross at trial, but also takes into account Freddy Harris's statement that John Dean went to Cleveland only once with Sharon Dunnigan, it seems to me that the court appropriately must find that for purposes of sentencing, there was but one trip of two ounces. And, accordingly, the court does so and finds the total of the defendant's involvement to be ten ounces rather than twelve. It is true that the witness Wynema Brown—excuse me, I stated the court finds the total number of ounces to be ten rather than twelve. What I should have said is the court finds the total number of ounces to be fourteen rather than sixteen.

[34] Now then, there is the further reference by the government in its objection to the Wynema Brown evidence. And the court declines to accept that evidence for purposes of sentencing. The court is satisfied that the fourteen ounces that have been detailed in the Probation Department's presentence report accurately reflects the defendant's involvement and relevant conduct in the case, and is similarly insufficient as a ground for departure in view of the totality of the circumstances involved in this instance.

Accordingly, the court is left with the question of whether the defendant is entitled—or whether, I should say, the defendant should be assessed with a two point addition for obstruction of justice by reason of her trial testimony. The court finds that the defendant was untruthful at trial with respect to material matters in this case. The defendant denied her involvement when it is clear from the evidence in the case as the jury found beyond a reasonable doubt that she was involved in the conspiracy alleged in the indictment, and by virtue of her failure to give truthful testimony on material matters that were designed to substantially affect the outcome of the case, the court concludes that the false testimony at trial warrants an upward adjustment by two levels.

I believe that covers all of the points that are raised. Unless the parties have something further, the court is prepared to conclude that the witness will stand at a level [35] of—that is, an offense level of 24 with a criminal history of I, so that the defendant is at a range of 51 to 63 months for sentencing guidelines purposes.

Now, two questions. First of all, is the court's calculation based on its findings accurate? Are the parties ready to advise the court in that regard?

MS. LECOCQ: Yes, Your Honor, it is.

MR. MILLER: Yes, sir, Your Honor, it is.

THE COURT: And before the court makes final the tentative findings so made, do the parties have any objection to the court's findings or any further comment to make regarding them? The government?

MS. LECOCQ: Yes, Your Honor. We would ask that as the court determines where to sentence within the range, that the court consider not only the defendant's untruthfulness at trial, but her untruthfulness here today in this courtroom, and we would also ask the court to consider the conduct related to the court under oath by Wynema Brown, wherein the defendant involved not

only herself but her child in the business of crack cocaine.

THE COURT: Thank you. Now, again, with respect to the findings, is there any objection to the court's findings or any other comment to be made respecting them before the court undertakes to finalize those findings?

MR. MILLER: No, sir.

[36] THE COURT: I gather there are no objections to the court's findings if I don't hear otherwise from you. I think the comments you were making, Ms. Lecocq, went more towards the point of sentencing at what point in the range. Did I understand you correctly?

MS. LECOCQ: Yes, Your Honor. I'm sorry, I thought that's what the court had inquired of me.

THE COURT: That being the case, the court adheres to the findings that it just noted on the record and makes those the findings of the court for purposes of sentence.

Now then, let me ask the parties to return to the bench, please.

I would note also that, although no particular issue has been made of it, the court having found the two-level increase by reason of the adjustment for obstruction of justice, that, correspondingly, the court declines an adjustment for acceptance of responsibility in the case, the court finding that based on that which took place at trial, as well as the defendant's continued insistence on her innocence, notwithstanding the jury verdict and the wealth of evidence developed at trial, that the defendant is not entitled to acceptance of responsibility in the case, and, once again, finds a total offense level to be 24, the criminal history to be I, and the guideline range for custody purposes to be 51 to 63 months.

[37] Do you see any reason why sentence should not now be pronounced in the case. Mr. Miller?

MR. MILLER: No, sir, I don't.

THE COURT: Mrs. Dunnigan, do you see any reason why sentence should not be pronounced in your case?

THE DEFENDANT: No.

THE COURT: Pardon?

THE DEFENDANT: No.

THE COURT: Let me ask, Mr. Miller, whether or not you have anything to say in your client's behalf, whether by way of mitigation of punishment or otherwise?

MR. MILLER: No, sir, Your Honor, nothing that would require a downward departure.

THE COURT: Quite apart from the downward departure, the court is also faced with the issue of where within the range—

MR. MILLER: Within the range.

THE COURT: —of 51 to 63 months the defendant should be sentenced. Have you anything further in that regard?

MR. MILLER: Yes, sir, Your Honor. I would just mention the fact that she is the sole support of a minor child. She has been constantly employed, unlike the other people in this trial who testified against her. She has always been a law-abiding citizen for the most part up to this point. So I think that she does need to get back to that one child that she [38] has who is still a minor. And if the court would consider that, I'm certain that she would appreciate it and so would the child.

THE COURT: Thank you. Ms. Lecocq, you mentioned a moment ago two items which the court should take into account in determining where within the range to sentence, and I'll be happy to hear you on any further matter or that again if you wish.

MS. LECOCQ: Your Honor, I would just remind the court of my earlier remarks. I don't think they need to be restated, and add the following. In light of the court's earlier ruling concerning the drug quantity, we are now at the very top of the drug quantity range for the level 22, and we are very close to offense level 24 in the drug quantity table, and we would ask the court to consider that as well in considering where within the range to sentence this defendant.

THE COURT: Thank you. Anything further in light of the government's comments, Mr. Miller?

MR. MILLER: No, sir, Your Honor.

THE COURT: Miss Dunnigan, have you anything you wish to say in your own behalf, whether by way of mitigation of punishment or otherwise?

THE DEFENDANT: I'm just sorry that you-all believe all of that and I do miss my kid and my grandchildren. I don't know what else I can say. And I can't accept any acceptance [39] because I didn't do it. That's the only thing that I can say.

THE COURT: Miss Dunnigan, let me ask you. When you say "I didn't do it"—and I want you to confer with counsel before you answer this question because I am not going to ask you to incriminate yourself in any way and so I do want you to confer with Mr. Miller before you respond and it's perfectly satisfactory with the court if you decline to answer, I will fully understand that, but my question of you is simply this. Is it your contention that this charge in its entirety is one that all of these other people who testified against you simply concocted, that it had no basis whatever? I want you to talk to your attorney about that before you answer, and if you don't wish to respond to it or if he feels you shouldn't respond to it, I want you to understand that I will be in sympathy with that declination to respond. Before you do respond, I want you to talk to Mr. Miller first.

(Pause.)

THE COURT: Mr. Miller, is there any response?

MR. MILLER: Yes, sir. I conferred with Miss Dunnigan. She indicated to me she would like to make a statement concerning the answer of your question.

THE COURT: Yes, ma'am.

THE DEFENDANT: I do believe that it was concocted. And I had received at one time two letters from different people that were in Huntington stating that they were up there [40] concocting thir story against me.

THE COURT: I am going to suggest that you may, after conferring with Mr. Miller, want to turn those letters over to the government. It seems to me that the government would be interested in exploring that matter if it is one that has any validity. And if you do choose to turn that information over to the government and if it does appear that it indicates some real basis, that stories are being concocted, lies are being prepared in order to bring about your unwarranted conviction, then I will be interested in seeing to it that the government follows the matter as well.

MR. MILLER: Your Honor, may it please the court.

THE COURT: Yes.

MR. MILLER: I have seen the letters, and in each case, the person asks not to be identified, and that is why there was no attempt.

THE DEFENDANT: Only one person asked that.

MR. MILLER: One person asked not to be identified. The other person said I would testify in your behalf but it might hurt my own case. So, in other words, these two people were unavailable to me for purposes of producing them at trial because I thought they might be more damaging to Ms. Dunnigan if we called them and they did not testify to what we expected them to testify to.

THE COURT: I leave it to the defendant as to whether [41] or not she wishes to pursue the matter.

THE DEFENDANT: Did you receive a letter from me where I had stated that in a letter?

THE COURT: I have read whatever communications you have furnished, ma'am.

THE DEFENDANT: Okay.

THE COURT: Now then, if there is nothing further —and do you have anything further, ma'am?

THE DEFENDANT: Not at the moment.

THE COURT: You understand this is the last time to say anything to the court before the court sentences you and I want you to understand that. Is there anything else you want to say?

THE DEFENDANT: No.

THE COURT: Miss Dunnigan, the court in assessing your case for purposes of sentencing notes that you are in the guideline range of 51 to 63 months. The government has indicated that the court should take into account, and the government is quite right, the court should indeed take into account the fact that you continue to protest your innocence today, notwithstanding the finding of the jury based on the evidence of quite a number of witnesses who claim to have dealt with you in cocaine. The court also takes into account that which Ms. Lecocq noted regarding the testimony of Wynema Brown respecting cocaine base involvement with your [42] daughter. Those are both serious matters, of course, and particularly if the court were to give credit to Wynema Brown's statement regarding your involvement with your daughter, that would indicate a matter of some gravity.

Insofar as you continue to profess your innocence is concerned, it seems to me you have already been assessed a high penalty in the case by virtue of the fact that, one, you were assessed an additional two points or two levels for obstruction of justice and you lost the benefit of two levels by way of acceptance of responsibility. If you had the credit for those four points so that you were sentenced at a level of 20 instead of 24, it would have made a substantial difference in the number of months that you are facing.

In addition to that, I observe that in the sentencing of those who testified against you, that Freddy Harris, the ringleader, received 78 months, although he did cooperate with the government, unlike yourself. His involvement was rather extensive and his sentence again came to 78 months. Andre Charlton received a sentence of 63 months. His involvement was that of one who tested cocaine, as I recall. And his sentence at 63 months was increased because of the obstruction aspect involved as well. John Dean cooperated with the government extensively and was largely responsible for bringing down the ring. He was sentenced to four years. And although that was a sub-

stantial sentence, nevertheless, he was facing an enormous [43] exposure in the case, but because he gave substantial assistance to the government, he was drawn down to the 48 month level.

Your role seemed to be that of contact and courier. And when I undertake to place you among all these others, it seems to me that, particularly in view of the fact that you have no prior criminal record of any moment, that the lower end of the range of 51 months is appropriate. So although I recognize the validity of the government's point that you continue to protest your innocence today and the possibility that you may have been involved, as Wynema Brown says, with your daughter in cocaine base, I am still of the notion in view of the lack of any significant criminal record on your part, that 51 months is ample in your case. It is a very long time. Even with the credit for good time, you are going to find yourself imprisoned for something in the area of 45 months or so, and that in itself is a very substantial penalty for that which you have been involved.

So the court will sentence you at the 51 month level. And will impose, as well, a term of supervised release of three years, and the court will make as special conditions those 17 conditions that apply in this district by order. The court assesses, as well, a 50 dollar special assessment in the case. Has that been paid yet by chance?

MR. MILLER: No, sir.

[44] THE COURT: And I am going to direct that be paid by you within six months from this date out of prison earnings or otherwise. The court will not impose a fine or a requirement that you pay the costs of your incarceration or that you pay the costs of your supervised release because the court finds you don't have the funds with which to do so and there is no prospect during your supervised release that you will have those funds sufficient to meet your living expenses and that of any family members, and to pay as well anything further.

So the court assesses nothing other than a 50 dollar special assessment.

Let me ask if there is anything further in this matter.

MS. LECOCQ: No, Your Honor.

MR. MILLER: I have nothing further, Your Honor.

THE COURT: If there is nothing further, good luck to you, ma'am. I would note to you that you have ten days from this date within which to appeal your conviction and sentence in this case, and if you are without funds with which to prosecute that appeal, then should you request and should you qualify, the court would appoint counsel for you at the expense of the United States and the cost of your appeal would otherwise be at the expense of the United States as well. Thank you.

I would note, if I might, that the court would like to [45] make as part of the record in this case the pages of the transcript that were furnished to the court of the John Dean testimony. And if the parties have no objection, I'll simply make that which was handed to the court that record. Is that satisfactory?

MR. MILLER: Yes, sir, Your Honor.

THE COURT: Is that all right?

MS. LECOCQ: The John Dean—oh, grand jury testimony.

THE COURT: John Dean grand jury testimony.

MS. LECOCQ: We would ask that the whole grand jury testimony be placed in the record, Your Honor.

THE COURT: It seems to me that that's unnecessary. The court was not furnished the balance of the grand jury testimony in making its determination of the issues in this case. It was furnished with that which the court requested. Once the issue of the grand jury testimony arose by virtue of the cross-examination of Mr. Miller, then I wanted it all. When I found it all, I found what was coming clear in that question and answer that Mr. Miller asked. If the government had wanted the court to consider any other grand jury testimony, it should have asked the court to do so. I declined to make the

balance of it a part of this record because it had nothing to do with this record. If the government had offered it up, it would have been reviewed. The government didn't do [46] it. It seems to me too late after the court has passed sentence to do that now.

Is there anything further?

MR. MILLER: No, sir.

THE COURT: Thank you.

(At 4:40 p.m. court adjourned.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA

Case Number 2:89-00036

UNITED STATES OF AMERICA

v.

SHARON DUNNIGAN

JUDGMENT INCLUDING SENTENCE UNDER THE SENTENCING REFORM ACT

[Entered May 23, 1990]

Douglas Miller, Defendant's Attorney.

THE DEFENDANT:

☒ was found guilty on the single-count indictment after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

21 U.S.C. § 846, Conspiracy to distribute cocaine, single-count.

The defendant is sentenced as provided in pages 2 through 4 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☒ It is ordered that the defendant shall pay to the United States a special assessment of $50.00, which shall be due by November 21, 1990, and shall be payable from defendant's earnings while incarcerated.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until

all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's Soc. Sec. Number:
232-84-9910

Defendant's mailing address:
1715 Holyoke
East Cleveland, Ohio

Defendant's residence address:
1715 Holyoke
East Cleveland, Ohio

May 21, 1990
Date of Imposition of Sentence

/s/ John T. Copenhaver, Jr.
Signature of Judicial Officer

JOHN T. COPENHAVER, JR.
United States District Judge
Name & Title of Judicial Officer

May 23, 1990
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of Fifty-one (51) months.

☒ The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this Judgment as follows:

_____

_____

Defendant delivered on to at , with a certified copy of this Judgment.

United States Marshal

By Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of THREE (3) YEARS, upon Standard Conditions of Supervised Release 1 through 17 set forth in the standing order entered by the court on September 29, 1989, including in-patient substance abuse treatment.

While on supervised release, the defendant shall not commit another Federal, state, or local crime and shall comply with the standard conditions that have been adopted by this court (set forth on the following page). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

☐ The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

FINE WITH SPECIAL ASSESSMENT

The defendant shall pay to the United States the sum of $, consisting of a fine of $ and a special assessment of $.

☐ These amounts are the totals of the fines and assessments imposed on individual counts, as follows:

This sum shall be paid

☐ immediately.
☐ as follows:

☐ The Court has determined that the defendant does not have the ability to pay interest. It is ordered that:

☐ The interest requirement is waived.
☐ The interest requirement is modified as follows:

The court has determined that the defendant does not have the ability to pay a fine or the costs of custody or supervision. It is ORDERED that these requirements are waived.

SUPREME COURT OF THE UNITED STATES

No. 91-1300

UNITED STATES, PETITIONER

v.

SHARON DUNNIGAN

ORDER ALLOWING CERTIORARI

Filed May 26, 1992

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit is granted.

May 26, 1992

☆ U. S. GOVERNMENT PRINTING OFFICE: 1992 312324 47014

(5)

No. 91-1300

FILED
JUL 10 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA, PETITIONER

v.

SHARON DUNNIGAN

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the Constitution prohibits a court from enhancing a defendant's sentence under Sentencing Guidelines § 3C1.1 if the court finds that the defendant committed perjury at trial.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Sentencing Guideline involved	2
Statement	2
Summary of argument	8
Argument:	
Sentencing Guidelines § 3C1.1 can constitutionally be applied to enhance a defendant's sentence if the court finds that the defendant testified falsely at trial	11
A. Before the Sentencing Guidelines went into effect, a sentencing court could take into account the fact that the defendant lied when he testified	12
1. Sentencing courts have long been authorized to consider all relevant sentencing information	12
2. A defendant's false testimony at trial is relevant sentencing information	15
B. The Sentencing Guidelines have not altered the constitutional rule that a sentencing court may consider a defendant's perjury at trial	17
1. The Sentencing Guidelines require a district court to enhance a defendant's sentence if he testifies falsely at trial	17
2. Increasing a defendant's sentence because he testified falsely at trial does not violate the defendant's right to testify in his own behalf	19
Conclusion	29

TABLE OF AUTHORITIES

Cases: Page

Braxton v. *United States*, 111 S. Ct. 1854 (1991) 7
Burns v. *United States*, 111 S. Ct. 2182 (1991) 17
Carter v. *Illinois*, 329 U.S. 173 (1946) 12
Dawson v. *Delaware*, 112 S. Ct. 1093 (1992) 17
Gregg v. *Georgia*, 428 U.S. 153 (1976) 22
Harris v. *New York*, 401 U.S. 222 (1971) 24
Hess v. *United States*, 496 F.2d 936 (8th Cir. 1974) 15
Houle v. *United States*, 493 F.2d 915 (5th Cir. 1974) 14
Humes v. *United States*, 186 F.2d 875 (10th Cir. 1951) 15
McGautha v. *California*, 402 U.S. 183 (1971) 28
Mistretta v. *United States*, 488 U.S. 361 (1989) 17, 20, 21-22
Nix v. *Whiteside*, 475 U.S. 157 (1986) 17, 24
Payne v. *Tennessee*, 111 S. Ct. 2597 (1991) 17
Rock v. *Arkansas*, 483 U.S. 44 (1987) 19
Scott v. *United States*, 419 F.2d 264 (D.C. Cir. 1969) 15
Smith v. *United States*, 551 F.2d 1193 (10th Cir.), cert. denied, 434 U.S. 830 (1977) 14
Spaziano v. *Florida*, 468 U.S. 447 (1984) 22
Townsend v. *Burke*, 334 U.S. 736 (1948) 13
United States v. *Acosta-Cazares*, 878 F.2d 945 (6th Cir.), cert. denied, 493 U.S. 899 (1989) 11
United States v. *Atkins*, 480 F.2d 1223 (9th Cir. 1973) 14
United States v. *Barbosa*, 906 F.2d 1366 (9th Cir.), cert. denied, 111 S. Ct. 394 (1990) 11
United States v. *Bass*, 535 F.2d 110 (D.C. Cir. 1976) 14
United States v. *Batista-Polanco*, 927 F.2d 14 (1st Cir. 1991) 11
United States v. *Beaulieu*, 900 F.2d 1537 (10th Cir.), cert. denied, 497 U.S. 1009 (1990) 11
United States v. *Bernard*, 757 F.2d 1439 (4th Cir. 1985) 14

Cases—Continued: Page

United States v. *Bowdach*, 561 F.2d 1160 (5th Cir. 1977) 14
United States v. *Cardi*, 519 F.2d 309 (7th Cir. 1975) 14
United States v. *Cluchette*, 465 F.2d 749 (9th Cir. 1972) 15
United States v. *Contreras*, 937 F.2d 1191 (7th Cir. 1991) 11, 19
United States v. *Craigo*, 956 F.2d 65 (4th Cir. 1992) 11
United States v. *Crowe*, 516 F.2d 824 (4th Cir. 1975) 14
United States v. *Donelson*, 695 F.2d 583 (D.C. Cir. 1982) 14
United States v. *Doyle*, 348 F.2d 715 (2d Cir.), cert. denied, 382 U.S. 843 (1965) 14
United States v. *Fatico*, 603 F.2d 1053 (2d Cir. 1979) 18
United States v. *Funt*, 896 F.2d 1288 (11th Cir. 1990) 14
United States v. *Grayson*:
438 U.S. 41 (1978) 5, 6, 9, 15, 16, 21, 22, 24, 27
550 F.2d 103 (3d Cir. 1977), rev'd, 438 U.S. 41 (1978) 15
United States v. *Hansen*, 701 F.2d 1078 (2d Cir. 1983) 14
United States v. *Hendrix*, 505 F.2d 1233 (2d Cir. 1974), cert. denied, 423 U.S. 897 (1975) 15
United States v. *Johnson*, 507 F.2d 826 (7th Cir. 1974), cert. denied, 421 U.S. 949 (1975) 14
United States v. *Jones*, 950 F.2d 1309 (7th Cir. 1991) 11
United States v. *Levine*, 372 F.2d 70 (7th Cir. 1967) 15
United States v. *Lozoya-Morales*, 931 F.2d 1216 (7th Cir. 1991) 26, 27
United States v. *Martinez*, 922 F.2d 914 (1st Cir. 1991) 27
United States v. *Matos*, 907 F.2d 274 (2d Cir. 1990) 11

Cases—Continued: Page

United States v. *Metz*, 470 F.2d 1140 (3d Cir. 1972), cert. denied, 411 U.S. 919 (1973) 14
United States v. *Moore*, 484 F.2d 1284 (4th Cir. 1973) 15
United States v. *Needles*, 472 F.2d 652 (2d Cir. 1973) 14
United States v. *Nunn*, 525 F.2d 958 (5th Cir. 1976) 15
United States v. *Ogbeifun*, 949 F.2d 1013 (8th Cir. 1991) 11
United States v. *Ortiz*, 742 F.2d 712 (2d Cir.), cert. denied, 469 U.S. 1075 (1984) 14
United States v. *Strauss*, 443 F.2d 986 (1st Cir.), cert. denied, 404 U.S. 851 (1971) 14
United States v. *Sweig*, 454 F.2d 181 (2d Cir. 1972) 14
United States v. *Tucker*, 404 U.S. 443 (1972) 13
United States v. *Wagner*, 884 F.2d 1090 (8th Cir. 1989), cert. denied, 494 U.S. 1088 (1990) 11
United States v. *Wallace*, 418 F.2d 876 (6th Cir. 1969), cert. denied, 397 U.S. 955 (1970) 15
United States v. *Wallace*, 904 F.2d 603 (11th Cir. 1990) 11
United States v. *Wong*, 431 U.S. 174 (1977) 24
Williams v. *New York*, 337 U.S. 241 (1949) 12, 13, 14, 15
Williams v. *Oklahoma*, 358 U.S. 576 (1959) 13

Statutes and rules:

Sentencing Reform Act of 1984:
18 U.S.C. 3551-3742 17
18 U.S.C. 3553(a)(2) 20
18 U.S.C. 3577 (1982) 13
18 U.S.C. 3661 17
28 U.S.C. 991-998 17
28 U.S.C. 994(k) 21
21 U.S.C. 846 2

Sentencing Guidelines:
§ 1B1.3, Application Note 5 (Nov. 1991) 18

Rules—Continued: Page

§ 3C1.1 (Nov. 1989) ..... *passim*
§ 3C1.1 ..... *passim*
Application Note 1 (c) (Nov. 1989) 19
Application Note 3 19
§ 6A1.3 ..... 9, 18

Miscellaneous:

F. Allen, *The Decline of the Rehabilitative Ideal* (1981) 22
N. Morris, *The Future of Imprisonment* (1974) 22
United States Sentencing Comm'n, *Guidelines Manual* App. C, amend. 347 (Nov. 1991) 19

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 91-1300

UNITED STATES OF AMERICA, PETITIONER

v.

SHARON DUNNIGAN

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a-15a, is reported at 944 F.2d 178. The opinion dissenting from the denial of rehearing en banc, Pet. App. 18a-28a, is reported at 950 F.2d 149.

JURISDICTION

The judgment of the court of appeals was entered on August 30, 1991. A petition for rehearing was denied on November 13, 1991. Pet. App. 16a-17a. The petition for a writ of certiorari was filed on February 10, 1992, and was granted on May 26,

1992. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

SENTENCING GUIDELINE INVOLVED

The 1989 version of Sentencing Guidelines § 3C1.1, which applied to respondent's sentencing, provided as follows:

> If the defendant willfully impeded or obstructed, or attempted to impede or obstruct the administration of justice during the investigation or prosecution of the instant offense, increase the offense level by 2 levels.

The current version of Sentencing Guidelines § 3C1.1 provides as follows:

> If the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense, increase the offense level by 2 levels.

STATEMENT

After a jury trial in the United States District Court for the Southern District of West Virginia, respondent was convicted of conspiring to distribute cocaine, in violation of 21 U.S.C. 846. She was sentenced to 51 months' imprisonment, to be followed by a three-year term of supervised release. J.A. 40-41. The court of appeals affirmed her conviction, but vacated her sentence and remanded the case for resentencing.

1. Respondent belonged to an organization headed by Freddie Harris, a cocaine dealer in the Charleston, West Virginia, area. The ring was broken up in the late summer of 1988. Harris and a number of co-conspirators subsequently pleaded guilty to cocaine distribution charges. Pet. App. 2a.

Respondent was charged with conspiring to distribute cocaine with Harris and others during the summer of 1988. At respondent's trial, Harris and four other former co-conspirators testified against her. The evidence showed the following: Respondent served as Harris's source of cocaine in Cleveland, Ohio. On several occasions during the summer of 1988, she traveled to Cleveland alone, with Harris, and with another conspirator to obtain cocaine and other drugs. Respondent was also involved in the testing, preparation, and packaging of cocaine for Harris's organization. She tested and packaged cocaine at her apartment, and she employed her daughter to convert powdered cocaine into the form known as "crack" and to sell it in that form. Pet. App. 2a-4a; Tr. 6-17, 52-56, 67-68, 81-102, 115-118, 141-142, 152-155, 164-165, 173-177.

Respondent's defense was simple; as the court of appeals put it, she "took the stand and denied everything." Pet. App. 4a. Respondent testified that she did not buy, sell, or use cocaine and that she did not know anyone in Cleveland who did. She admitted traveling to Cleveland, but she testified that the purpose of those trips was to visit relatives. *Id.* at 5a. Respondent denied knowing whether anyone had manufactured crack cocaine at her apartment.

On cross-examination, the government asked respondent whether she had sold crack to an Edward Dickerson in the summer of 1988. Respondent denied having done so. Pet. App. 5a; Tr. 188-195, 198-205.

On rebuttal, Edward Dickerson testified that he became an informant in 1988 and that in the sum-

mer of that year law enforcement officials monitored a transaction in which he purchased crack cocaine from respondent at her apartment. The officer involved in the investigation corroborated Dickerson's testimony. Another cooperating co-conspirator also testified to having purchased crack cocaine from respondent. In addition, according to that witness, respondent gave crack and powdered cocaine to her daughter, who sold crack for respondent. Pet. App. 5a; Tr. 209-213, 232-235, 241-245. The jury convicted respondent.

2. At sentencing, the district court found that respondent lied when she testified at trial. The court therefore enhanced her offense level by two levels on the ground that, by committing perjury at trial, she had obstructed justice within the meaning of Sentencing Guidelines § 3C1.1. The court observed, J.A. 29:

> The court finds that the defendant was untruthful at trial with respect to material matters in this case. The defendant denied her involvement when it is clear from the evidence in the case as the jury found beyond a reasonable doubt that she was involved in the conspiracy alleged in the indictment, and by virtue of her failure to give truthful testimony on material matters that were designed to substantially affect the outcome of the case, the court concludes that the false testimony at trial warrants an upward adjustment by two levels.

The two-level enhancement increased respondent's offense level from 22 to 24. Because respondent's criminal history category was I, the sentencing range for respondent was 51-63 months' imprisonment. The district court sentenced respondent at the bottom of that range.

3. The court of appeals vacated respondent's sentence and remanded for resentencing. Pet. App. 1a-15a. The court acknowledged that every other circuit to consider the issue had upheld the constitutionality of applying the enhancement authorized by Sentencing Guidelines § 3C1.1 to defendants who perjured themselves at trial. The court stated, however, that "[o]ur sense of justice requires us to disagree." Pet. App. 10a. The court expressed a "fear that this enhancement will become the commonplace punishment for a convicted defendant who has had the audacity to deny the charges against him," because "[n]early all testifying defendants tell a story that, if believed in full, would result in acquittal. The jury's verdict implies a disbelief of some material aspect of the defendant's testimony." *Ibid.* The court was disturbed by the prospect that "testimony by an accused in his own defense, so basic to justice, is deemed to 'obstruct' justice unless the accused convinces the jury." *Ibid.* The court concluded that many factors, such as the prospect of being impeached with a prior conviction, already discourage defendants from testifying, and the prospect of receiving an "automatic" enhancement under Sentencing Guidelines § 3C1.1 may lead a defendant to believe that testifying is not "worth the risk." Pet. App. 12a.

The court of appeals recognized that in *United States* v. *Grayson*, 438 U.S. 41 (1978), this Court ruled that a sentencing court may consider the fact that the defendant testified falsely at trial. Pet. App. 12a. Nonetheless, the court found that *Grayson* did not settle the question of the constitutionality of a "perjury enhancement" under the Sentencing Guidelines. "The most basic difference" between this case and *Grayson*, the court found, "is the stated justifica-

tion for enhancing sentence." *Ibid.* "The guidelines deem a denial of guilt on the stand 'obstruction of justice,' " the court stated, whereas *Grayson* allowed the trial courts to consider a defendant's untruthfulness "for the purpose of illuminating his need for rehabilitation and the society's need for protection." *Id.* at 12a-13a (quoting *Grayson*, 438 U.S. at 53). The court further noted that *Grayson* did not require "a sentencing judge to enhance, in some wooden or reflex fashion, the sentences of all defendants whose testimony is deemed false," while the Sentencing Guidelines require just such a " 'wooden or reflex' enhancement." Pet. App. 13a (quoting *Grayson*, 438 U.S. at 55).

The court of appeals found that there are insufficient safeguards in place to prevent Section 3C1.1 from coercing a defendant into remaining silent at trial. In particular, the court believed that the trial judge's decision to enhance the defendant's sentence under Sentencing Guidelines § 3C1.1 is effectively unreviewable on appeal. "[I]n light of the jury's verdict of guilt, the district court's finding will never be 'clearly erroneous' where the verdict is sustainable; if the verdict cannot be supported, the sentencing finding will of course be moot." Pet. App. 14a. The admonition in the commentary to Sentencing Guidelines § 3C1.1 that a district court should view the defendant's testimony in the light most favorable to him was also ineffectual, the court believed, because "a defendant's testimony that has been apparently rejected in material respect by a jury will almost always compel a finding of untruthfulness." Pet. App. 14a. The court therefore concluded that "[t]he rigidity of the guidelines makes the § 3C1.1 enhancement for a disbelieved denial of guilt under oath an intolerable burden upon the defendant's right to testify in his own behalf." Pet. App. 15a.

4. The government sought rehearing en banc, which the court of appeals denied by a 6-6 vote. Pet. App. 16a-17a. Judge Wilkins filed an opinion dissenting from the denial of rehearing en banc, which was joined by Judges Wilkinson, Niemeyer, and Luttig. *Id.* at 18a-28a. Judge Wilkins noted that "[n]ot only does the panel adopt a position at odds with every circuit that has addressed this question, but it does so on a constitutional basis, thereby preventing the United States Sentencing Commission from using its authority, acknowledged in *Braxton* v. *United States*, [111 S. Ct. 1854, 1857-1858 (1991)], to resolve the conflict." Pet. App. 19a n.2.

Judge Wilkins explained that because the Sentencing Commission sought to further traditional sentencing goals such as retribution, incapacitation, and deterrence, perjured testimony by the defendant is still an appropriate sentencing consideration, just as it was at the time of *Grayson*. Pet. App. 21a. In addition, he explained that, contrary to the panel's assumption, Sentencing Guidelines § 3C1.1 "is not to be applied indiscriminately to every defendant who testifies and is ultimately convicted." Pet. App. 22a. In response to the panel's concern that a defendant whose sentence was enhanced because he committed perjury could not effectively challenge the district court's finding on appeal, Judge Wilkins cited a number of cases in which courts of appeals reversed what they saw as inappropriate applications of the perjury enhancement. *Id.* at 23a-24a. He added that "not a single appellate court has affirmatively supported the type of automatic, mechanistic enhancement over which the panel expresses its concern." *Id.* at 24a.

Finally, Judge Wilkins found implausible the claim that a defendant would be chilled from testifying by the fear of receiving an enhanced sentence for perjury under Sentencing Guidelines § 3C1.1. To the contrary, Judge Wilkins explained, the Guidelines are likely to reduce any such chilling effect. He reasoned that under the Guidelines, a defendant "who previously confronted the possibility of a virtually unlimited increase in his sentence if he took the stand on his own behalf but was ultimately convicted, would now be *more* likely to exercise his right when the down-side risk he faces has been quantified and limited." Pet. App. 27a-28a.

SUMMARY OF ARGUMENT

A. Historically, sentencing courts have been permitted to consider any relevant information, including crimes or misconduct by the defendant other than the offense of conviction. A defendant's prior record of criminal conduct has always been considered important to the sentencing decision, because it may reveal that a lengthy term of incarceration is necessary as retribution for the defendant's misdeeds, to incapacitate the offender, or to attempt to rehabilitate him. The probative value of a defendant's criminal record has been regarded as so weighty that a defendant's prior misconduct could be considered at sentencing even in the absence of a conviction. Courts have been permitted to consider a defendant's arrests, pending indictments, dismissed charges, charges reversed on appeal, and even charges ending in an acquittal.

Among the prior acts of criminal conduct that a sentencing court has been permitted to consider is a defendant's commission of perjury while testifying

at his trial. This Court endorsed that practice in *United States* v. *Grayson*, 438 U.S. 41 (1978). The Court rejected claims that allowing a trial judge to consider his first-hand observations of the defendant's perjury would improperly punish the defendant for having testified or would deter defendants from exercising their right to take the stand.

B. The principles underlying the decision in *Grayson* are still valid today. A sentencing judge may consider a broad range of relevant information, and a defendant does not have a right to give false testimony at trial. The Sentencing Guidelines fully embrace those principles. Section 6A1.3 of the Guidelines provides that district courts may consider any reliable evidence at sentencing, and Section 3C1.1 requires the court to enhance the defendant's sentence if he obstructs justice, which includes committing perjury at trial. Section 3C1.1 is the vehicle by which the Guidelines implement the rule upheld by this Court in *Grayson*.

The Fourth Circuit, however, held that Guidelines § 3C1.1 is unconstitutional, for several reasons. None of those reasons is persuasive.

First, the court of appeals was troubled by the fact that Guidelines § 3C1.1 classifies a defendant's false testimony as "obstruction of justice," whereas *Grayson* treated the defendant's perjury as simply one factor that a sentencing court could consider in the exercise of its discretion. The label used to describe Section 3C1.1 should be immaterial, since the label has no independent effect. Section 3C1.1 also is not a disguised attempt to punish a convicted defendant for testifying. A defendant who perjures himself thereby indicates his willingness to break the law when he finds it in his interest, which establishes his

continuing danger to the community. A defendant's perjury therefore is relevant to the need for incapacitation.

Second, the court of appeals concluded that Section 3C1.1 is impermissible because it is mandatory and would tend to deter innocent defendants with prior convictions from testifying. But before the Guidelines went into effect, district courts had unfettered discretion to penalize a defendant up to the statutory maximum if the court found that the defendant testified falsely. While Section 3C1.1 requires that the defendant's base offense level be raised if he testifies perjuriously, it limits the amount of the enhancement. The limitation on the potential penalty for testifying falsely may make the chilling effect of the penalty less than it would be under a discretionary sentencing system, where the potential penalty is limited only by the statutory maximum penalty for the charged offense.

There is nothing improper about discouraging untruthful testimony; the "chilling effect" of a penalty such as the one set forth in Sentencing Guidelines § 3C1.1 is a matter of concern only if it chills truthful testimony. The risk that Section 3C1.1 will have such an effect is remote. It is highly unlikely that a defendant facing an unjustified conviction will be dissuaded from giving truthful, exculpatory testimony because he fears that the jury may unjustifiably convict him and the sentencing court may then find that he perjured himself and increase his offense level by two levels for sentencing purposes.

ARGUMENT

SENTENCING GUIDELINES § 3C1.1 CAN CONSTITUTIONALLY BE APPLIED TO ENHANCE A DEFENDANT'S SENTENCE IF THE COURT FINDS THAT THE DEFENDANT TESTIFIED FALSELY AT TRIAL

The question in this case is whether the Constitution permits a court to apply Sentencing Guidelines § 3C1.1 to a defendant who testifies falsely at trial. Nine courts of appeals have addressed that question. Each court other than the one below has held that the Constitution does not prohibit a district court from enhancing the defendant's sentence under Sentencing Guidelines § 3C1.1 if the court finds that the defendant gave false testimony at trial.[1] Only the Fourth Circuit in this case and in *United States* v. *Craigo*, 956 F.2d 65 (1992), has ruled to the contrary.[2]

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[1] See *United States* v. *Batista-Polanco*, 927 F.2d 14, 22 (1st Cir. 1991); *United States* v. *Matos*, 907 F.2d 274, 276 (2d Cir. 1990); *United States* v. *Acosta-Cazares*, 878 F.2d 945, 953 (6th Cir.), cert. denied, 493 U.S. 899 (1989); *United States* v. *Contreras*, 937 F.2d 1191, 1194-1195 (7th Cir. 1991); *United States* v. *Wagner*, 884 F.2d 1090, 1098-1099 (8th Cir. 1989), cert. denied, 494 U.S. 1088 (1990); *United States* v. *Barbosa*, 906 F.2d 1366, 1369-1370 (9th Cir.), cert. denied, 111 S. Ct. 394 (1990); *United States* v. *Beaulieu*, 900 F.2d 1537, 1539-1540 (10th Cir.), cert. denied, 497 U.S. 1009 (1990); *United States* v. *Wallace*, 904 F.2d 603, 604-605 (11th Cir. 1990).

[2] After the Fourth Circuit issued its decision in this case, the Seventh and Eighth Circuits reconsidered the question whether Sentencing Guidelines § 3C1.1 may constitutionally be applied to perjury by the defendant at trial. Both courts reaffirmed their prior holdings and rejected the Fourth Circuit's analysis. *United States* v. *Jones*, 950 F.2d 1309, 1315-1316 (7th Cir. 1991); *United States* v. *Ogbeifun*, 949 F.2d 1013, 1014 (8th Cir. 1991).

The decision below is clearly incorrect. Before the Sentencing Guidelines went into effect, a district court could consider at sentencing its belief that the defendant committed perjury when he testified. Nothing in the Sentencing Guidelines altered that well-settled rule or justifies the conclusion that the Constitution requires that a different balance must now be struck.

A. Before The Sentencing Guidelines Went Into Effect, A Sentencing Court Could Take Into Account The Fact That The Defendant Lied When He Testified

1. *Sentencing courts have long been authorized to consider all relevant sentencing information*

"It is a commonplace that no more difficult task confronts judges than the determination of punishment not fixed by statute." *Carter* v. *Illinois*, 329 U.S. 173, 178 (1946). For that reason, this Court has long recognized that "[h]ighly relevant—if not essential—to [the] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics." *Williams* v. *New York*, 337 U.S. 241, 247 (1949). In fact, "both before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law." *Id.* at 246.

To ensure that district courts would have the widest possible range of information available at sentencing, Congress expressly directed that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person

convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." 18 U.S.C. 3577 (1982). The sentencing judge therefore has been authorized to "conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come." *United States* v. *Tucker*, 404 U.S. 443, 446 (1972). A sentence imposed within statutory limits would not be disturbed unless it was "founded at least in part upon misinformation of constitutional magnitude." *Id.* at 447.

Applying those principles, this Court and the lower federal courts have uniformly concluded that a sentencing court may consider diverse information as long as the matters considered are reliably established and reasonably related to a legitimate sentencing goal. See *Tucker*, 404 U.S. at 447; *Townsend* v. *Burke*, 334 U.S. 736, 741 (1948). Because of its obvious relevance to a number of sentencing considerations, the defendant's prior criminal conduct is viewed as a prime factor for the courts to consider at sentencing. See, *e.g.*, *Tucker*, 404 U.S. at 447; *Williams* v. *Oklahoma*, 358 U.S. 576, 584 (1959); *Williams* v. *New York*, 337 U.S. at 244. A criminal record may show that prolonged incarceration of an offender is necessary to protect society by incapacitating the offender. Courts have also concluded that the interest in retribution and the need for rehabilitation are greater for a recidivist than for a first-time offender. Indeed, the probative value of that evidence has been considered so great that sentencing courts have been permitted to consider a defendant's prior misconduct even in the absence of a conviction. Thus, it has been held that a judge may consider evidence

concerning a defendant's uncharged criminal acts,[3] arrests,[4] pending indictments,[5] dismissed charges,[6] charges reversed on appeal,[7] or charges resulting in an acquittal.[8]

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[3] *E.g.*, *Williams* v. *New York*, 337 U.S. at 244; *United States* v. *Bass*, 535 F.2d 110, 118-120 (D.C. Cir. 1976); *United States* v. *Crowe*, 516 F.2d 824, 826 (4th Cir. 1975); *United States* v. *Strauss*, 443 F.2d 986, 990-991 (1st Cir.), cert. denied, 404 U.S. 851 (1971).

[4] *E.g.*, *Smith* v. *United States*, 551 F.2d 1193, 1195-1196 (10th Cir.), cert. denied, 434 U.S. 830 (1977); *Houle* v. *United States*, 493 F.2d 915, 915 (5th Cir. 1974).

[5] *E.g.*, *United States* v. *Johnson*, 507 F.2d 826, 829-830 (7th Cir. 1974), cert. denied, 421 U.S. 949 (1975); *United States* v. *Metz*, 470 F.2d 1140, 1141-1142 (3d Cir. 1972) (collecting cases), cert. denied, 411 U.S. 919 (1973).

[6] *E.g.*, *United States* v. *Oritz*, 742 F.2d 712, 714 n.3 (2d Cir.), cert. denied, 469 U.S. 1075 (1984); *United States* v. *Hansen*, 701 F.2d 1078, 1081-1082 (2d Cir. 1983); *United States* v. *Needles*, 472 F.2d 652, 654-656 (2d Cir. 1973); *United States* v. *Doyle*, 348 F.2d 715, 721 (2d Cir.), cert. denied, 382 U.S. 843 (1965).

[7] *E.g.*, *United States* v. *Atkins*, 480 F.2d 1223, 1224 (9th Cir. 1973).

[8] *E.g.*, *United States* v. *Donelson*, 695 F.2d 583, 590 (D.C. Cir. 1982) (Scalia, J.) ("It is well established that a sentencing judge may take into account facts introduced at trial relating to other charges, even ones of which the defendant has been acquitted."); *United States* v. *Funt*, 896 F.2d 1288, 1300 (11th Cir. 1990); *United States* v. *Bernard*, 757 F.2d 1439, 1444 (4th Cir. 1985); *United States* v. *Bowdach*, 561 F.2d 1160, 1175 (5th Cir. 1977); *United States* v. *Cardi*, 519 F.2d 309, 314 n.3 (7th Cir. 1975); *United States* v. *Sweig*, 454 F.2d 181, 183-184 (2d Cir. 1972).

2. *A defendant's false testimony at trial is relevant sentencing information*

Among the facts that a sentencing court has been permitted to consider is the defendant's commission of perjury while testifying at his trial. Following this Court's 1949 decision in *Williams* v. *New York*, most federal courts of appeals concluded that a sentencing judge could properly take into account for sentencing purposes that a defendant committed perjury at his trial.[9] In 1978, this Court upheld that practice in *United States* v. *Grayson*, 438 U.S. 41.

Grayson explained that the "history of sentencing * * * demonstrates that it is proper—indeed, even necessary for the rational exercise of discretion—to consider the defendant's whole person and personality, as manifested by his conduct at trial and his testimony under oath, for whatever light those may shed on the sentencing decision." 438 U.S. at 53. With regard to perjury, the Court stated that "[a] defendant's truthfulness or mendacity while testifying on his own behalf, almost without exception, has been deemed probative of his attitudes toward society

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[9] Compare *United States* v. *Nunn*, 525 F.2d 958 (5th Cir. 1976); *United States* v. *Hendrix*, 505 F.2d 1233 (2d Cir. 1974), cert. denied, 423 U.S. 897 (1975); *Hess* v. *United States*, 496 F.2d 936 (8th Cir. 1974); *United States* v. *Moore*, 484 F.2d 1284 (4th Cir. 1973); *United States* v. *Cluchette*, 465 F.2d 749 (9th Cir. 1972); *United States* v. *Wallace*, 418 F.2d 876 (6th Cir. 1969), cert. denied, 397 U.S. 955 (1970); *United States* v. *Levine*, 372 F.2d 70 (7th Cir. 1967); and *Humes* v. *United States*, 186 F.2d 875 (10th Cir. 1951) (all ruling that a district court can consider a defendant's trial perjury), with *United States* v. *Grayson*, 550 F.2d 103 (3d Cir. 1977), rev'd, 438 U.S. 41 (1978); *Scott* v. *United States*, 419 F.2d 264, 268-269 (D.C. Cir. 1969) (adopting the contrary rule).

and prospects for rehabilitation and hence relevant to sentencing." *Id.* at 50. This Court found "persuasive" the proposition that even "[i]f the notion of 'repentance' is out of fashion today, the fact remains that a manipulative defiance of the law is not a cheerful datum for the prognosis a sentencing judge undertakes." *Id.* at 51.

Grayson also deemed "without basis" the claim that allowing courts to consider a defendant's false testimony would "chill" a defendant's willingness to exercise his right to testify on his own behalf. 438 U.S. at 54. As the Court explained, *ibid.*:

> The right guaranteed by law to a defendant is narrowly the right to testify truthfully in accordance with the oath—unless we are to say that the oath is mere ritual without meaning. This view of the right involved is confirmed by the unquestioned constitutionality of perjury statutes, which punish those who willfully give false testimony. * * * Assuming, *arguendo*, that the sentencing judge's consideration of defendants' untruthfulness in testifying has any chilling effect on a defendant's decision to testify falsely, that effect is entirely permissible. There is no protected right to commit perjury.

The Court treated as "entirely frivolous" the proposition that allowing courts to consider perjury as a sentencing factor would inhibit defendants from testifying truthfully. *Id.* at 55. In sum, *Grayson* made clear that the Constitution does not prohibit a court from enhancing the defendant's sentence on the ground that he perjured himself while testifying at trial.

B. The Sentencing Guidelines Have Not Altered The Constitutional Rule That A Sentencing Court May Consider A Defendant's Perjury At Trial

1. *The Sentencing Guidelines require a district court to enhance a defendant's sentence if he testifies falsely at trial*

The constitutional principles set forth in *Williams* v. *New York*, *Tucker*, and *Grayson* are still valid today. This Court has recently reiterated that a trial judge may consider a broad range of relevant information at sentencing. See *Dawson* v. *Delaware*, 112 S. Ct. 1093, 1097 (1992); *Payne* v. *Tennessee*, 111 S. Ct. 2597, 2606 (1991). It is also still the law that a defendant does not have a right to give false testimony at trial. See *Nix* v. *Whiteside*, 475 U.S. 157, 173 (1986) ("Whatever the scope of a constitutional right to testify, it is elementary that such a right does not extend to testifying *falsely*.").

The Sentencing Reform Act of 1984, 18 U.S.C. 3551-3742 and 28 U.S.C. 991-998, and the Sentencing Guidelines are entirely consistent with those principles. In the Act, Congress directed the Sentencing Commission to adopt a comprehensive system of guidelines to channel the district courts' sentencing discretion. See *Burns* v. *United States*, 111 S. Ct. 2182, 2184 (1991); *Mistretta* v. *United States*, 488 U.S. 361, 367-370 (1989). At the same time, Congress did not restrict the information that courts may consider at sentencing. On the contrary, Congress reaffirmed the prior rule that "[n]o limitation" should be placed on the information that sentencing courts may take into account. 18 U.S.C. 3661.

The Sentencing Guidelines incorporate that principle as well. Section 6A1.3 of the Guidelines provides that district courts may consider any reliable

evidence at sentencing.[10] If there is a question about the reliability of the information available to the court, the Guidelines endorse the practice of conducting an evidentiary hearing to resolve that question. *Ibid.* See *United States* v. *Fatico*, 603 F.2d 1053, 1057 n.9 (2d Cir. 1979). What is more, no Sentencing Guideline provides that evidence is barred from consideration on the ground that it concerns illegal conduct for which the defendant has not been convicted.[11] District courts today may therefore still conduct the wide-ranging inquiry that the Court envisioned in *Williams* v. *New York*, *Tucker*, and *Grayson*.

In particular, the Sentencing Guidelines require a district court to consider whether the defendant gave false testimony at trial. Section 3C1.1 of the Guidelines requires the court to impose a two-level enhancement for obstruction of justice, and the accompanying commentary explains that "the types of conduct to which this enhancement applies" including "committing * * * perjury."[12] Sentencing Guidelines § 3C1.1, Application Note 3. Accordingly, Sentencing Guidelines § 3C1.1 authorizes—indeed, requires—a district court to enhance a defendant's sentence for the reason upheld in *Grayson*. As the Seventh Circuit put it, Section 3C1.1 is "merely the technical means by which sentencing courts can continue under the Guidelines to consider the kind of evidence approved by the Court in *Grayson*." *United States* v. *Contreras*, 937 F.2d 1191, 1195 (1991).

[10] Section 6A1.3 (Policy Statement) provides that:

> (a) * * * In resolving any reasonable dispute concerning a factor important to the sentencing determination, the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy.

[11] The Guidelines do not require a conviction unless a provision expressly imposes such a requirement. See Sentencing Guidelines § 1B1.3, Application Note 5 (Nov. 1991): "A particular guideline (in the base offense level or in a specific offense characteristic) may expressly direct that a particular factor be applied only if the defendant was convicted of a particular statute. * * * Unless such an express direction is included, conviction under the statute is not required."

2. *Increasing a defendant's sentence because he testified falsely at trial does not violate the defendant's right to testify in his own behalf*

The court of appeals concluded that applying the enhancement in Sentencing Guidelines § 3C1.1 to a testifying defendant would violate his constitutional right to testify, see *Rock* v. *Arkansas*, 483 U.S. 44, 49-53 (1987), for several reasons. The reasons given by the court of appeals, however, do not justify that conclusion.

a. The court of appeals found it significant that Sentencing Guidelines § 3C1.1 characterizes a defendant's false testimony as "obstruction of justice,"

[12] The version of the commentary that was in effect at the time of respondent's sentencing was essentially the same. It provided that "testifying untruthfully * * * concerning a material fact" was one of the grounds for applying the Section 3C1.1 enhancement. Guidelines § 3C1.1, Application Note 1(c) (Nov. 1989). Although the Guideline itself has been amended since the time of respondent's sentencing, the only material change was the addition of a reference to the obstruction of justice at sentencing. United States Sentencing Comm'n, *Guidelines Manual* App. C, amendment 347, at 163 (Nov. 1991). The other changes in the Guideline and application notes were intended only for clarification. *Ibid.*

whereas *Grayson* treated the defendant's perjury as a factor bearing on his prospects for rehabilitation and society's need for protection that a court could consider (or ignore) in the exercise of its sentencing discretion. Pet. App. 12a-13a. The court of appeals' concern in this respect appears to be that the label affixed to Guidelines § 3C1.1 reflects the purpose of punishing the defendant for having committed perjury, instead of an intent to use that factor as one of many from which a court assesses the defendant's prospects for rehabilitation, as *Grayson* contemplated.

It is true that the Guidelines do not leave the consideration of a defendant's perjury to the court's discretion. In contrast to the discretionary sentencing laws, the Sentencing Guidelines direct a court to enhance the defendant's sentence for perjury, and they specify precisely how much weight that factor should have. But the mandatory nature of federal sentencing is simply a natural consequence of channeling the courts' sentencing discretion through a system of guidelines; it is not a veiled effort to punish a defendant for a new offense. The use of the label "obstruction of justice" to describe the enhancement for perjury at trial thus does not make that enhancement unconstitutional.

Enhancing a defendant's punishment based on his willingness to commit perjury is consistent with the penological goals on which the Sentencing Guidelines rest, which include the incapacitation of offenders who are likely to continue committing crimes. 18 U.S.C. 3553(a)(2); *Mistretta*, 488 U.S. at 367. A defendant who perjures himself at trial indicates that he is prepared to break the law whenever he finds it in his interest. In that respect, the commission of perjury is no different from conduct such as threaten-

ing a witness, tampering with the jury, or suborning perjury, all of which reveal the defendant's lack of respect for important rules governing the conduct of trials. Since a willingness to break the law is strongly indicative of the defendant's continuing danger to the community, that factor justifies incapacitating him for a longer period than would otherwise be necessary.[13] The enhancement authorized by Sentencing Guidelines § 3C1.1 thus implements a penological goal identified by the Sentencing Reform Act of 1984 and does not punish a defendant for a crime not charged against him.

It is true that the Court in *Grayson* based its ruling in part on its conclusion that a defendant's willingness to lie under oath is "probative of his prospects for rehabilitation." 438 U.S. at 52. It is also the case that federal sentencing policy no longer looks to rehabilitation as a basis for selecting a sentence. The Sentencing Reform Act of 1984 "rejects imprisonment as a means of promoting rehabilitation," see 28 U.S.C. 994(k), and instead directs that "punishment should serve retributive, educational, deterrent, and incapacitative goals." *Mistretta* v. *United States*,

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[13] The Guidelines, of course, reflect traditional sentencing practice by placing great weight on the defendant's prior commission of criminal acts, through the use of the criminal history score as one of the two principal determinants of the defendant's sentence. The commission of perjury at trial is in some respects an especially strong indicator of the defendant's willingness to continue to engage in criminal conduct, since it reflects criminal conduct occurring immediately before the sentencing proceeding, not conduct that may have occurred years before, as is often the case when prior convictions are considered for sentencing purposes.

488 U.S. at 367.[14] However, the fact that imprisonment is not to be imposed under the Guidelines for the purpose of rehabilitating the defendant does not mean that the constitutional rule adopted in *Grayson* is no longer valid. The Court in *Grayson* made it clear that the practice of considering a defendant's untruthfulness at trial serves not only the defendant's need for rehabilitation, but also "society's need for protection." 438 U.S. at 53. Indeed, the likelihood that a defendant will continue to commit offenses, *i.e.*, that he will not be rehabilitated as a result of his prosecution and punishment, relates directly to the need to protect society by incapacitating the defendant for a lengthy period of time.[15] It is therefore entirely consistent with *Grayson* to conclude that the defendant's perjury is a sensible factor to consider in deciding what term of incapacitation is necessary for the protection of society.

b. The court of appeals also noted that in *Grayson* this Court held that courts enjoy the discretion to enhance a defendant's sentence if he testified falsely, whereas Guidelines § 3C1.1 *requires* a court to enhance a defendant's sentence if the court determines that the defendant perjured himself. Pet. App. 13a. The court relied on the following passage from *Grayson*, 438 U.S. at 55, quoted at Pet. App. 13a:

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[14] Congress's conclusion on that score reflects the current view among criminologists that rehabilitation is dubious as a penological theory and is virtually unattainable in most cases as a practical matter. *Mistretta*, 488 U.S. at 365, citing N. Morris, *The Future of Imprisonment* 24-43 (1974), and F. Allen, *The Decline of the Rehabilitative Ideal* (1981).

[15] Incapacitation is, of course, a legitimate sentencing goal, *Spaziano* v. *Florida*, 468 U.S. 447, 461-462 (1984); *Gregg* v. *Georgia*, 428 U.S. 153, 183 n.28 (1976) (opinion of Stewart, Powell, and Stevens, JJ.).

> Nothing we say today requires a sentencing judge to enhance, in some wooden or reflex fashion, the sentences of all defendants whose testimony is deemed false. Rather, we are reaffirming the authority of a sentencing judge to evaluate carefully a defendant's testimony on the stand, determine—with a consciousness of the frailty of human judgment—whether that testimony contained willful and material falsehoods, and, if so, assess in light of all the other knowledge gained about the defendant the meaning of that conduct with respect to his prospects for rehabilitation and restoration to a useful place in society. Awareness of such a process realistically cannot be deemed to affect the decision of an accused but unconvicted defendant to testify truthfully in his own behalf.

The court believed the "automatic § 3C1.1 enhancement," Pet. App. 12a, is "precisely the 'wooden or reflex' enhancement disclaimed by the Court" in *Grayson*, Pet. App. 13a, and could well tip the scales against testifying for "an innocent defendant with prior convictions," *id.* at 11a-12a. In addition, the court feared that there were insufficient safeguards to prevent the obstruction of justice enhancement "from unfairly coercing defendants, guilty or innocent, into remaining silent at trial." *Id.* at 14a. In the court's view, the enhancement could be applied to every testifying defendant who is convicted, since the guilty verdict would effectively insulate from challenge on appeal the judge's decision to enhance a defendant's sentence. *Ibid.* Each of those conclusions is wrong.

Although *Grayson* did not require enhancement of a defendant's sentence in every case in which he committed perjury, the Court in *Grayson* did not in any way suggest that Congress or an agency like the Sen-

tencing Commission could not make a general judgment that perjury should be considered an aggravating factor in the sentencing calculus. Section 3C1.1 of the Sentencing Guidelines does just that. The Guidelines generalize and codify many sentencing considerations that were formerly taken into account in a less regularized fashion. As in the case of other sentencing factors, the Guidelines require that courts consider trial perjury in sentencing, while at the same time placing limits on the effect that that factor can have on the sentencing decision.

Contrary to the court of appeals' view, Section 3C1.1 is not likely to deter defendants from exercising their right to testify in their own behalf. At the outset, it is important to note that it is no criticism of the practice of enhancing sentences for perjury that it may inhibit defendants from presenting perjurious testimony. See *Grayson*, 438 U.S. at 54. There is no right to commit perjury, even in one's own defense. See *Nix* v. *Whiteside*, *supra*; *United States* v. *Wong*, 431 U.S. 174, 178-189 (1977); *Harris* v. *New York*, 401 U.S. 222, 225 (1971). Perjury at trial, even on the part of the defendant himself, undermines the proper functioning of the criminal justice system. Accordingly, any mechanism that discourages perjury is not only permissible, but affirmatively desirable.

While applying Guidelines § 3C1.1 to perjured testimony at trial may discourage the giving of false testimony in some cases, it is highly unlikely to discourage defendants from giving truthful testimony in their own defense. A defendant's overriding goal when he goes to trial is avoiding a conviction; his decision whether to testify will therefore almost certainly turn on his judgment as to whether testifying

will increase the chances of his acquittal. That decision in turn depends upon a delicate balancing of a number of factors, such as the credibility of his testimony, his prior criminal record and susceptibility to impeachment, his capacity to withstand cross-examination effectively, the strength of the government's case, and the availability of other defense evidence. It would be the rare defendant who, having determined that an assessment of those factors dictates that he take the witness stand, would jeopardize his chance of acquittal by forgoing the presentation of truthful, exculpatory testimony because of concern that his story would appear false, the jury would find him guilty, and the trial judge would erroneously conclude that he was testifying falsely and increase his base offense level by two levels at sentencing.

Moreover, to the extent that a truthful defendant considers the possibility of a sentence penalty for perjury, there is no reason to believe that he will be more deterred from testifying by Guidelines § 3C1.1 than he would have been before the Sentencing Guidelines went into effect. As Judge Wilkins noted in his dissent from denial of en banc review, a defendant can now make a precise calculation of what perjury might cost him, *i.e.*, a two-level increase in his base offense level. Pet. App. 27a-28a. Previously, district courts enjoyed unfettered discretion to penalize a defendant up to the statutory maximum if the court found that the defendant had testified falsely. Although Section 3C1.1 requires an increase in the defendant's base offense level if the defendant testifies falsely, it limits the amount of the increase. By so doing, Section 3C1.1 may well have less effect in discouraging defendants from testifying than the prior, discretionary sentencing system.

The court of appeals believed that the enhancement imposed by Sentencing Guidelines § 3C1.1 would be applied to every testifying defendant who is convicted. Pet. App. 13a-14a.[16] That belief is mistaken. As noted above, Section 3C1.1 authorizes an enhancement only if the court finds that the defendant committed perjury while testifying. That distinction is important, because a testifying defendant who is convicted does not, by that fact alone, "obstruct justice" under Sentencing Guidelines § 3C1.1.

That point is illustrated by the Seventh Circuit's decision in *United States* v. *Lozoya-Morales*, 931 F.2d 1216 (1991). There, the district court penalized the defendant under Sentencing Guidelines § 3C1.1 for his untruthful trial testimony, stating that "[i]f a defendant gets up on the stand and gives a story that the jury does not believe, the jury is finding that he is not telling the truth." 931 F.2d at 1218. The court of appeals rejected that approach stating that it is improper to "[i]mpos[e] the penalty automatically from a jury verdict that concededly does not establish the defendant lied in his testimony." *Id.* at 1219. Only if the court finds that the defendant perjured himself (or if the record compels that conclu-

[16] Relying on a statement made at the oral argument by the Assistant United States Attorney, the Fourth Circuit believed that the government's position is that "every defendant who takes the stand and is convicted should be given the obstruction of justice enhancement." Pet. App. 10a. That is not our position. In our rehearing petition, we pointed out that we do not take—in fact, we quite affirmatively reject—the position that every testifying defendant who is convicted should, for that reason alone, receive an enhancement under Sentencing Guidelines § 3C1.1. As explained in the text, district courts need not find that every defendant who testifies and is convicted committed perjury.

sion) would the Section 3C1.1 enhancement be warranted. 931 F.2d at 1219-1220. See also *United States* v. *Martinez*, 922 F.2d 914, 925-926 (1st Cir. 1991) (rejecting claim that defendant may be found to have committed obstruction of justice under Section 3C1.1 simply because he testified and the jury nevertheless convicted him).

The court of appeals expressed skepticism that district courts can or will apply Guidelines § 3C1.1 properly and that courts of appeals can police district courts' actions. Pet. App. 14a. But there is no reason to be pessimistic about the ability and willingness of district and circuit courts properly to apply Section 3C1.1. The other circuits that have addressed this issue have not found the undertaking unmanageable, nor have they found that district courts have behaved in a fashion that defies the ability of courts of appeals to review the application of Section 3C1.1 in particular cases. Moreover, if this Court makes clear how Section 3C1.1 should be applied, the risks that it will be applied improperly by lower courts should be greatly reduced. *Grayson* relied on "[t]he integrity of the judges, and their fidelity to their oaths of office" as "the only, and in our view adequate, assurance against" the misuse of their "first-hand observation of perjury." 438 U.S. at 54. This Court should have no less confidence in the district and circuit courts today.

Finally, to the extent that the decision below rests on the notion that it is impermissible to burden the defendant's constitutional right to testify by attaching a cost to the exercise of that right—the risk that a court will enhance the defendant's sentence for perjury if he is convicted—the court's analysis is misguided. To say that a defendant has a constitutional

right is not to say that he must be allowed to exercise it free of any risk of adverse consequences.

The Court rejected a similar argument in *Crampton* v. *Ohio*, a companion case of *McGautha* v. *California*, 402 U.S. 183 (1971). *Crampton* involved a state procedure by which guilt and punishment were determined by the jury at a single trial. Under the Ohio unitary-trial rule, the defendant could remain silent on the issue of guilt only by surrendering his chance to be heard by the jury on the issue of punishment and could testify on the issue of punishment only by waiving his privilege against compelled self-incrimination on the question of guilt. The defendant contended that that election "create[d] an intolerable tension between constitutional rights." *Id.* at 211. This Court disagreed. It stated that "[t]he criminal process, like the rest of the legal system, is replete with situations requiring 'the making of difficult judgments' as to which course to follow," and that the situation faced by defendants in unitary trials was no different from a host of other "choices with which criminal defendants and their attorneys are quite routinely faced." *Id.* at 213, 215. It is, said the Court, "not thought inconsistent with the enlightened administration of criminal justice to require the defendant to weigh such pros and cons in deciding whether to testify." *Id.* at 215.

Those principles were expressed in response to the contention that a defendant has the right to speak to his sentencer free from any adverse consequences on the issue of guilt. They are equally applicable to the analogous claim that a defendant must be allowed to testify at trial without apprehension that a court will find that he testified falsely and consider that false testimony at sentencing. The Court would

not credit the argument that a sentencing court should not take into account that a defendant tampered with the jury or suborned perjury at his trial because considering those factors might chill the exercise by other defendants of their rights to go to trial or put on a defense. The same principle should apply to a defendant's commission of the crime of perjury.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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QUESTIONS PRESENTED

1. Whether Respondent Sharon Dunnigan's sentence was lawfully enhanced two levels for obstruction of justice under Sentencing Guideline §3C1.1.

2. Whether Sentencing Guideline §3C1.1 has adequate safeguards to prevent an unconstitutional application to convicted defendants who have testified at trial.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
SUMMARY OF ARGUMENT	1
ARGUMENT:	
Sentencing Guideline §3C1.1 was unlawfully applied to Respondent Sharon Dunnigan due to an absence of an independent finding of facts by the sentencing district court	3
A. Sentencing Guideline §3C1.1 was unlawfully applied to Respondent Dunnigan	3
B. The fourth Circuit properly declared that §3C1.1 was unconstitutional because the enhancement can not be applied without infringing upon the fifth amendment right to testify in one's own behalf due to the lack of adequate safeguards	9
CONCLUSION	15

TABLE OF AUTHORITIES

Cases:	Page
Bordenkircher v. Hayes, 434 U.S. 357 (1978)	8
North Carolina v. Pearce, 395 U.S. 711 (1969)	8
United States v. Barbosa, 906 F.2d 1366 (9th Cir.) cert denied, 111 S.Ct. 394 (1990)	11
United States v. Batista-Polanco, 927 F.2d 14 (1st Cir. 1991)	4,10,11
United States v. Beaulieu 900 F.2d 1537 (10th Cir.)cert. denied, 497 U.S. 1009 (1990)	4,10,11
United States v. Bonds, 933 F.2d 152 (2nd Cir. 1991)	10,12
United States v. Contreras, 937 F.2d 1191 (7th Cir. 1991)	5,6
United States v. Corn, 956 F.2d 135 (7th Cir. 1992)	5,6
United States v. Craigo, 956 F.2d 65 (4th Cir. 1992)	3
United States v. Davis, 938 F.2d 744 (7th Cir. 1991)	5,6,12
United States v. Dunnigan, 944 F.2d 178 (4th Cir. 1991)	10
United States v. Franco-Torres, 869 F.2d 797 (5th Cir.)	11
United States v. Grayson, 438 U.S. 41 (1978)	2,4,6,8
United States v. Husky, 924 F.2d 223 (11th Cir. 1991)	5,6,11
United States v. Lozoya-Morales, 931 F.2d 1216 (7th Cir. 1991)	5,6,7
United States v. Martinez, 922 F.2d 914 (1st Cir. 1991)	5,6,12
United States v. Matos, 907 F.2d 274 (2nd Cir. 1990)	4,10,11
United States v. Ogbeifun, 949 F.2d 1013 (8th Cir. 1991)	5,6
United States v. O'Meara, 895 F.2d 1220	4,10
United States v. Seabolt, 958 F.2d 231 (8th Cir. 1991)	5,6,12,15
United States v. Thompson, 962 F.2d 1069 (D.C. Cir. 1992)	13,14
United States v. Wallace, 904 F.2d 603 (11th Cir. 1990)	4,10,11

Cases-Continued: Page

United States v. Williams, 905 F.2d 217 (8th Cir.) cert denied, _____ U.S. _____, 111 S.Ct. 687 (1990) . 10

United States v. Willis, 940 F.2d 1136 (8th Cir. 1991) 5,6,12, 13,14,15

United States Sentencing Guideline:

§3C1.1 ..... *passim*

Application Note 3 11

In the Supreme Court of the United States

OCTOBER TERM, 1992

NO.91-1300

UNITED STATES OF AMERICA, PETITIONER

v.

SHARON DUNNIGAN

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR SHARON DUNNIGAN

SUMMARY OF ARGUMENT

A. The sentence imposed by the district court was unlawfully enhanced due to the district court's failure to make independent findings of false testimony and apparent reliance upon a guilty verdict to impose an enhancement for obstruction of justice under Sentencing Guideline §3C1.1. The absence of specific findings and reliance on the jury verdict compelled the court of appeals to reverse the application of the enhancement as a "wooden or reflexive" formality prohibited by pre-guidelines

standards for punishing perjured trial testimony as found in *United States v. Grayson*, 438 U.S. 41 (1978).

B. The court of appeals properly declared that the imposition of the §3C1.1 enhancement was fret with application infirmities which unconstitutionally impinged the right to testify in one's own defense. Existing safeguards against the chilling effect on the defendant's right to testify are inadequate as exemplified by the application of the enhancement in this case where no specific findings of perjury were made and the logical reliance upon a guilty verdict renders judicial review meaningless.

ARGUMENT

SENTENCING GUIDELINE §3C1.1 WAS UNLAWFULLY APPLIED TO RESPONDENT SHARON DUNNIGAN DUE TO AN ABSENCE OF AN INDEPENDENT FINDING OF FACTS BY THE SENTENCING DISTRICT COURT.

The primary question[1] in this case is not whether the Constitution permits application of Sentencing Guideline §3C1.1 to a defendant who testifies falsely at trial, but whether the two level enhancement was unconstitutionally applied to Respondent Sharon Dunnigan without specific findings of fact, and therefore based substantially upon the jury verdict of guilty. The secondary issue presented to this Court for review of the Fourth Circuit Court of Appeals' decision is whether the enhancement can be applied to any defendant, guilty or innocent, without a chilling effect on the Fifth Amendment right of a defendant to testify in his or her own behalf.

A. Sentencing Guideline §3C1.1 was unlawfully applied to Respondent Dunnigan.

The court of appeals did not expressly declare §3C1.1 intrinsically unconstitutional[2] when used to enhance a sentence for obstruction of justice based upon false testimony. The Court was compelled to declare the application of the guideline unconstitutional because of the absence of adequate safeguards and the

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[1] The government identifies the issue in this case as one of whether an obstruction of justice enhancement for perjured testimony is constitutionally prohibited under Sentencing Guideline §3C1.1. Government Brief p. 11.

[2] But compare. The Fourth Circuit left no doubt in *United States v. Craigo*, 956 F.2d 65, 68 (4th Cir. 1992) that the obstruction of justice enhancement was *per se* unconstitutional in an instance where the district court made specific findings that the defendant's testimony was ludicrous and perjurious which the court of appeals found to be supported by the evidence. In Dunnigan's case, no such specific findings were made by the district court or reviewed by the court of appeals.

natural consequence is a chilling effect on the Fifth Amendment right to testify by observing at Pet. App. p. 14:

> We are not satisfied that there are enough safeguards in place to prevent this enhancement from unfairly coercing defendants, *guilty or innocent*, into remaining silent at trial. Other circuits have reviewed the district court's finding of untruthfulness under a 'clearly erroneous' standard. *United States v. Batista-Polanco*, 927 F.2d at 22; *United States v. Matos*, 907 F.2d at 276; *United States v. Wallace*, 904 F.2d at 605; *United States v. Beaulieu* 900 F.2d at 1540; *United States v. O'Meara*, 895 F.2d at 1220. Of course, in light of the jury's verdict of guilt, the district court's finding will never be 'clearly erroneous' where the verdict is sustainable; if the verdict cannot be supported, the sentencing finding will of course be moot. Our review of these enhancements would therefore be an empty ritual. [emphasis added]

The Fourth Circuit did not defy the longstanding precedent in *United States v. Grayson*, 438 U.S. 41 (1978), but distinguished the application of Sentencing Guideline §3C1.1 in this case from *Grayson* by first pointing out that a recognized goal of pre-guideline sentencing was rehabilitation while the guideline's purpose was to punish a defendant for an uncharged offense. The Fourth Circuit did not dispute that a sentencing court could consider a defendant's perjury at trial, as well as numerous other negative personal history characteristics, as indicative of his or her need for rehabilitation and an increased sentence within the statutory range was constitutionally permissible. The Fourth Circuit perceived the two level enhancement as both violative of the *Grayson* proscription against "wooden or reflexive" sentencing decisions, and as a form of additional punishment for uncharged crimes for which an enhanced sentence is mandatorily imposed without adequate constitutional safeguards. The obstruction of justice two level enhancement of §3C1.1 imposed upon Dunnigan to increase her basic guideline range from 51

months to 63 months was equated by the Circuit Court to a punishment for the additional crime of obstruction of justice without an indictment or trial and was constitutionally infirm without the minimal safeguards required by *Grayson*.

Although the Fourth Circuit stands alone in saliently declaring that §3C1.1 has an unconstitutional chilling effect on the Fifth Amendment right of a defendant to testify, four other Circuits[3] have arrived at the conclusion that obstruction of justice for false testimony enhancement based solely upon a jury verdict of guilty is impermissible. Not one Circuit has expressly upheld the application of the enhancement based solely upon a jury verdict. The accord between the Fourth Circuit and the other Circuits[4] which have addressed the propriety of relying solely

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[3] C.f. *United States v. Martinez*, 922 F.2d 914, 926 (1st Cir. 1991) (Obstruction of justice enhancement based upon jury verdict alone amounts to punishment for exercising right to testify in own defense.) *United States v. Husky*, 924 F.2d 223, 225 (11th Cir. 1991) (Independent finding of willful perjury necessary rather than relying solely upon jury verdict.) *United States v. Seabolt*, 958 F.2d 231, 233 (8th Cir. 1992) (Court applauded independent clear-cut finding of perjury by the sentencing judge rather than relying upon jury verdict of guilty.) *United States v. Willis*, 940 F.2d 1136, 1140 (8th Cir. 1991) (Obstruction of justice enhancement cannot be given solely because jury disbelieves defendant. District Court must make independent finding.) *United States v. Corn*, 956 F.2d 135, 136 (7th Cir. 1992) (Court should not automatically enhance sentence of defendant who takes the stand and is convicted.) *United States v. Lozoya-Morales*, 931 F.2d 1216, 1219 (7th Cir. 1991) (Imposing enhancement penalty automatically from a jury verdict impinges on right to testify in defendant's behalf.) *United States v. Davis*, 938 F.2d 744, 747 (7th Cir. 1991) (Found that District Court made independent finding of perjury and did not rely solely upon jury verdict in affirming enhancement.) *United States v. Ogbeifun*, 949 F.2d 1013, 1014 (8th Cir. 1991) (Upheld application of two level enhancement where District Court made independent determination of false testimony rather than defendant's inability to convince jury of his innocence.) *United States v. Contreras*, 937 F.2d 1191, 1194 (7th Cir. 1991) (Jury and District Court found defendant's story was a batch of lies and distinguishing application from *United States v. Lozoya-Morales*, 931 F.2d 1216, 1218-1220 (7th Cir. 1991)

[4] *United States v. Martinez*, 922 F.2d 914, 926 does hold that an enhancement based upon a jury verdict alone amounts to punishment for testifying in one's own behalf.

upon the jury verdict to apply the enhancement ends on the issue of whether the enhancement can be implemented without infringing upon the Constitutional right to testify in one's own defense.

If the issue presented in this case is confined to whether the §3C1.1 guideline was properly applied to Dunnigan, there is little doubt that the enhancement is violative of *Grayson's* prohibition against "wooden or reflexive" reliance upon a guilty verdict and is inconsistent with the First, Seventh, Eighth, and Eleventh Circuits application of §3C1.1 in *United States v. Martinez*, 922 F.2d 914 (1st Cir. 1991); *United States v. Lozoya-Morales*, 931 F.2d 1216, 1218-1220 (7th Cir. 1991); *United States v. Contreras*, 937 F.2d 1191, 1194 (7th Cir. 1991) *United States v. Davis*, 938 F.2d 744, 747 (7th Cir. 1991); *United States v. Corn*, 956 F.2d 135, 136 (7th Cir. 1992); *United States v. Willis*, 940 F.2d 1136, 1140 (8th Cir. 1991); *United States v. Seabolt*, 958 F.2d 231, 233 (8th Cir. 1992); *United States v. Ogbeifun* 949 F.2d 1013, 1014 (8th Cir. 1991) and *United States v. Husky*, 924 F.2d 223, 225 (11th Cir. 1991).

The district court made no independent findings of fact and obviously placed great weight on the jury verdict in determining Dunnigan had testified falsely at trial and that a two-level enhancement was appropriate by summarily stating, J.A. 29:

> The court finds that the defendant was untruthful at trial with respect to material matters in this case. The defendant denied her involvement when *it is clear from the evidence in the case as the jury found beyond a reasonable doubt that she was involved in the conspiracy* alleged in the indictment, and by virtue of her failure to give truthful testimony on material matters that were designed to substantially affect the outcome of the case, the court concludes that the false testimony at trial warrants an upward adjustment by two levels. [Emphasis Added]

The expressed finding of the Court was that Dunnigan made a general denial of her participation in the conspiracy and that it

was clear from the jury's finding beyond a reasonable doubt she had testified falsely. There is no reference in the record to specific false testimony or that the sentencing judge weighed the testimony and reached an independent conclusion of perjury.

A similar assessment of untruthful testimony was held to be an unlawful impingement upon the right to testify in one's own behalf in *United States v. Lozoya-Morales*, at p. 1218-1220, where the district court made the following finding at the sentencing hearing for defendant Sanchez:

> [Y]our argument is that anytime a defendant takes the stand and is found guilty, that he'll be found to have perjured himself. It may very well be true, but I'm not sure that there's anything wrong with that. If a defendant gets up on the stand and gives a story that the jury does not believe, the jury is finding that he is not telling the truth. I'm punishing him for testifying untruthfully. The jury found that he testified untruthfully because they believed that he had in fact been involved in the distribution of cocaine. *id.* at 1218.

In reviewing the imposition of the enhancement, the Seventh Circuit noted that the absence of an independent finding of untruthfulness was a "wooden or reflexive" application not authorized by *Grayson*. Notably in *Lozoya-Morales*, co-defendant Morales' obstruction of justice enhancement was upheld by the Court when it found Morales had committed perjury by the sentencing judge's statement on the record, 'I believe that if you get up on the stand and lie about your involvement, that is an obstruction of justice and I believe that Mr. Morales did lie about his involvement. *Lozoya-Morales* i.d. at 1220.

Arguably, the district court's determination of perjury in this case falls some place between the two separate determinations relative to Sanchez and Morales in *Lozoya-Morales*, but as the Seventh Circuit noted at page 1220, "[A]mbiguities we shall resolve against the sentence." At best, the district court's deter-

mination of false testimony is ambiguous, and it is evident that the jury verdict of guilty carried substantial weight in the Court's determination.

The cursory manner by which the sentencing judge arrived at the determination of perjury is exactly what the Fourth Circuit perceived as the basis for the lack of meaningful judicial review of the court's sentencing decision when the jury verdict becomes a substantial factor in the sentencing process. There was no way for the court of appeals to review whether Dunnigan concocted a fairy tale or a cock and bull story or whether she told a plausible story that was disbelieved by the jury. It is conceivable that the jury believed none or all of Dunnigan's testimony except a small portion. Likewise, the absence of specific findings of perjury did not provide the court of appeals with a basis to review whether the district court properly resolved any conflicts in testimony in a light most favorable to the defendant as required by Application Note 3 of the Sentencing Guidelines.

It also can reasonbly be inferred from the government's position in oral argument[5] that the jury verdict automatically triggered the sentencing court's decision rather than specific findings of fact which could have been referred to in the record.

The only conceivable way that this Court could uphold Dunnigan's sentence is to renounce that portion of *Grayson* which condemns a "wooden or reflexive" application of increased punishment for false testimony based solely upon a jury verdict. This would also naturally entail condoning vindictive and retributive punishment for exercising a constitutional right which has been condemned in *North Carolina v. Pearce*, 395 U.S. 711, 726 (1969) and *Bordenkircher v. Hayes*, 434 U.S. 357 (1978). The swing of the pendulum from rehabilitative to punishment goals has not reached the point where the constitutional prohibitions against vindictiveness and retribution are abrogated.

The government's brief avoids any discussion of whether Dunnigan was lawfully sentenced by the district court and

[5] Pet. App. 10a

confines its attack on the broad unconstitutionality holding by the Fourth Circuit. The government cannot assert in good faith that Dunnigan was lawfully sentenced and that her enhancement was imposed unless it is advocated that "wooden or reflexive" reliance upon a jury verdict is conclusive evidence of perjury and that the punishment goal of the sentencing guidelines justify vindictiveness and retribution.

B. THE FOURTH CIRCUIT PROPERLY DECLARED THAT §3C1.1 WAS UNCONSTITUTIONAL BECAUSE THE ENHANCEMENT CAN NOT BE APPLIED WITHOUT INFRINGING UPON THE FIFTH AMENDMENT RIGHT TO TESTIFY IN ONE'S OWN BEHALF DUE TO THE LACK OF ADEQUATE SAFEGUARDS.

At first blush, it appears that the court of appeals overreached the issue presented to it in this case by declaring the application of §3C1.1 unconstitutional, however, it carefully noted that it was "not satisfied that there are enough safeguards in place" to uphold the application of the guideline in question. Pet. App. p. 14a. The court of appeals did not extend its determination of unconstitutionality to exclude the possibility that additional safeguards against a chilling effect on the right to testify can be implemented or that the existing process can be adapted to provide adequate safeguards.

If there were ever an instance where a party's oral argument had a negative impact on the outcome of the case, it is obvious from the opinion where the Court stated:

> *The government maintained at oral argument*[6] *that every defendant who takes the stand and is convicted should be given the obstruction of justice enhancement.* Certainly, if the guide-

[6] The government took an opposite position on its petition for a rehearing to the court of appeals and in its brief to this Court by repudiating but not denying the statement in oral argument before the court of appeals (Br. p. 26 Note 16)

lines are to be applied consistently, the government would be right. Nearly all testifying defendants tell a story that, if believed in full, would result in acquittal. The jury's verdict implies a disbelief of some material aspect of the defendant's testimony. Pet. App. 10a [Emphasis Added]

The government's position of automatic enhancement certainly initiated a perceptive analysis of an issue that has troubled the various Circuits which have attempted to wrestle with the following factors in determining the effect of a jury verdict of guilty on the application of §3C1.1 to enhance a convicted testifying defendant:

A. The government has the burden of proving an enhancement by a preponderance of the evidence[7];

B. If a jury finds a defendant guilty beyond a reasonable doubt and the defendant testified on a material issue, it is at the very least more probable than not that the defendant testified falsely[8]; and

C. The standard of reviewing the District Court's determination of whether there is a factual basis to apply the enhancement is on a "clearly wrong" basis[9].

It is an inescapable conclusion under the above legal framework, as the Court of Appeals noted, that government would be right in its position in oral argument that the guidelines enhancement automatically appended to the jury verdict, and that the reviewing court should uphold the imposition of the enhancement pursuant to the "clearly wrong" standard of review[10].

The court of appeals concluded that the guidelines lacked the

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[7] *United States v. Williams*, 905 F.2d 217, 218 (8th Cir. 1990) cert. denied, ____ U.S. _____, 111 S.Ct. 687 (1990)

[8] *United States v. Bonds*, 933 F.2d 152, 155 (2nd Cir. 1991)

[9] *United States v. Dunnigan*, 944 F.2d 178, 185, citing *United States v. Batista-Polanco*, 927 F.2d at 22; *United States v. Matos*, 907 F.2d at 276; *United States v. Wallace*, 904 F.2d at 605; *United States v. Beaulieu*, 900 F.2d at 1540; *United States v. O'Meara*, 895 F.2d at 1220.

[10] Pet. App. p. 10a.

appropriate safeguard of meaningful judicial review in reviewing the imposition of the enhancement based solely upon a jury verdict by stating:

> Of course, in light of the jury's verdict of guilty, the district court's finding will never be 'clearly wrong' where the verdict is sustainable; if the verdict cannot be supported, the sentencing finding will of course be moot. Our review of these enhancements would therefore be an empty ritual. Pet. App. p. 14a.

The court of appeals further expressed the opinion that the inclusion of the safeguard contained in United States Sentencing Guidelines Application Note 3[11], requiring the sentencing court to evaluate conflicting testimony in a light most favorable to the defendant[12], afforded no protection against an arbitrary application of the enhancement based upon a guilty verdict.

The diverse methods by which the various Circuits have dealt with the issue of reconciling the implications of the jury's guilty verdict with the prohibition against a "wooden or reflexive" application supports the court of appeals' unmanagebility conclusion.

The issue has been dealt with in the First, Seventh, Eighth and Eleventh Circuits by the additional requirement that the sentencing judge also make an independent finding that the testimony was material and willfully false. See *United States v. Husky*,

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[11] In this instance there is no indication that the district court applied Application Note 3 to the testimony or even considered any type of analysis.

[12] The "light most favorable" standard has been uniformly held to apply only in instances where the sentencing judge, after weighing the evidence has no firm conviction. See *United States v. Franco-Torres*, 869 F.2d 797, 801 (5th Cir.); *United States v. Beaulieu*, 900 F.2d 1537 (10th Cir. 1990); *United States v. Wallace*, 904 F.2d 603, 605 (11th Cir. 1990); *United States v. Matos*, 907 F.2d 274, 276 (2nd Cir. 1990); *United States v. Batista-Polanco*, 927 F.2d 14, 22 (1st Cir. 1991); *United States v. Barbosa*, 906 F.2d 1366, 1370 (9th Cir. _____) cert denied, ____ U.S. _____, 111 S.Ct. 394 (1991)

924 F.2d 223, 225; *United States v. Seabolt*, 958 F.2d 231, 233; *United States v. Willis*, 940 F.2d 1136, 1140; *United States v. Davis*, 938 F.2d 744, 747, and *United States v. Martinez*, 922 F.2d 914, 926. If the sentencing judge is required to exercise his or her independent judgment in making a separate determination of whether the defendant testified truthfully, the judge who concludes the defendant was truthful is also compelled to set aside the jury verdict. To do otherwise would fly in the face of traditional standards of judicial reasoning. On the other hand, if the court fails to apply the enhancement, but upholds the jury verdict, the denial of the enhancement is subject to an appeal by the government which will likely result in a reversal based upon the inconsistency of a guilty verdict and the finding of no perjury by the defendant[13].

The Eighth Circuit has attempted to resolve the dilemma presented by a jury verdict of guilty by compelling the sentencing judge to review the defendant's testimony under Application Note 1 pursuant to an objective standard of "... if a reasonable trier of fact could find the [defendant's] testimony true." *United States v. Willis*, 940 F.2d 1136, 1140 (8th Cir. 1991) See also *United States v. Seabolt*, 958 F.2d 231, 233 (8th Cir. 1992) Seemingly, the objective standard would enable a sentencing court to reconcile upholding the jury verdict but denying the enhancement.

Although, the objective standard appears to afford the defendant more protection against rigid application of §3C1.1, that was not the case in *United States v. Bonds* at 155 where the Court purportedly used an objective standard to uphold imposing the enhancement based upon a jury's guilty verdict:

> Here, by finding Bonds guilty of knowingly distributing counterfeit money, the jury necessarily determined that Bonds knew that the money he had distributed was counterfeit--that is, unless the jury's verdict was unsupported

[13] But *c.f. id.*

> by the evidence, in which case, of course, the remedy would be to reverse Bonds's conviction, not simply to disallow the two-level upgrade in sentencing. Because there is no indication that the judgment of conviction was invalid, it is clear that Bonds's testimony was objectively false. Moreover, inasmuch as the testimony concerned Bonds's own state of mind--a matter about which he was peculiarly knowledgeable--it is reasonable to conclude that Bonds was aware, at the time of testifying, that his statements were untrue. Accordingly, we affirm the two-level adjustment to Bonds's offense level.

Once more the unmanagability of the enhancement visualized by the Fourth Circuit is evident regardless of the standard utilized by the sentencing judge.

The objective standard established by the Eighth Circuit in *Willis* has been rejected in the District of Columbia Circuit in *United States v. Thompson*, 962 F.2d 1069, (D.C. Cir. 1992), where the defendant contended that a "no reasonable trier of fact" standard should be used, the court adhered to the subjective standard by stating:

> To limit enhancements only to cases of internally contradictory testimony or flagrant lying--or to permit enhancements only when no reasonable trier of fact could have found other than that the defendant lied--would be merely to reward the polished prevaricator while punishing those less practiced in the art of deception. We do not think that the Guidelines contemplate this distinction between different degrees of willful lying.
> *id.* at 1071.

In rejecting the objective standard, the District of Columbia Circuit once again relied upon the "wooden or reflexive" application of the jury verdict by holding:

> When a jury has answered the first question by finding beyond a reasonable doubt that the defendant lied, and could not be convicted otherwise, it might be anomalous for the judge to sentence the defendant upon the basis of the jury verdict and yet to refuse to enhance the sentence for perjury merely because the judge entertains a doubt that the defendant lied.
> *id* at 1071.

Judge Wald's dissent in *Thompson* advocating an objective standard similar to the Eighth Circuit's holding in *Willis* notes the same unmanageable infirmities which led the Fourth Circuit to rule the application of §3C1.1 unconstitutional in this case. The dissenting opinion pointed out the necessity for the safeguards of a higher level of proof by the objective standard of whether any reasonable trier of fact could have believed the defendant would effectively insure that the "wooden or reflexive" nature of §3C1.1 does not infringe upon Fifth Amendment rights[14].

The Fourth Circuit makes no effort to propose any process by which §3C1.1 can be constitutionally applied because in this instance the district court did not attempt to either make a subjective or objective findings of perjury but merely relied on the jury verdict. There was no controversy before it warranting the appeals court providing guidance and direction to the district court. Likewise, the government makes no such proposal as to how the guideline may be constitutionally applied to Dunnigan or to testifying defendants in general other than relying upon the integrity of judges[15].

It is Dunnigan's position that her sentence was unconstitutional by any standards. If this Court chooses to provide guidance and direction to lower trial and reviewing courts, the dissenting opinion in *Thompson* and the Eighth Circuit's decisions in *Willis* and *Seabolt* balance the right of a sentencing court to punish perjury at trial with the Fifth Amendment right to testify in one's own defense so as to provide the adequate safeguards which the court of appeals found inadequate in this case.

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[14] Id at 1073 (Wald, J. dissenting)
[15] See Government Br. p. 27.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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No. 91-1300

In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA, PETITIONER

v.

SHARON DUNNIGAN

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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1. Respondent argues that the district court "made no independent findings of fact and obviously placed great weight on the jury verdict in determining [respondent] had testified falsely at trial." Resp. Br. 6. That characterization of the district court's finding is inaccurate. The district court expressly found that respondent lied when she testified at trial. The court stated, J.A. 29:

> The court finds that the defendant was untruthful at trial with respect to material matters in

> this case. The defendant denied her involvement when it is clear from the evidence in the case as the jury found beyond a reasonable doubt that she was involved in the conspiracy alleged in the indictment, and by virtue of her failure to give truthful testimony on material matters that were designed to substantially affect the outcome of the case, the court concludes that the false testimony at trial warrants an upward adjustment by two levels.

Respondent argues that the court based its finding of perjury on the fact that she was convicted, but that is not what the district court did, as the court's remarks make clear. Although the court noted that the jury had found beyond a reasonable doubt that respondent was involved in the conspiracy charged in the indictment, that reference did not suggest that the court was relying on the jury's verdict to enhance respondent's sentence under Sentencing Guidelines § 3C1.1. Rather, the court was simply making the point that the jury agreed with the court's conclusion that respondent was involved in the conspiracy and that her testimony to the contrary was false. The district court's ruling therefore cannot be criticized on the ground that the court did not make an independent finding that respondent committed perjury when she testified at trial.

2. Respondent also argues, Resp. Br. 13-14, that the obstruction of justice enhancement in Sentencing Guidelines § 3C1.1, if applied to perjured testimony at trial, will be imposed on every testifying defendant who is convicted and thus will become an improper "wooden or reflexive" enhancement. That argument ignores the fact that a court must make an independent determination whether the defendant committed

perjury, and that there are circumstances in which a defendant may testify truthfully, but nonetheless properly be convicted by a jury or a court.

To begin with, a district court must uphold a conviction if a reasonable jury could have found the evidence sufficient, regardless of the court's own view of the evidence and the credibility of the witnesses. See *Jackson* v. *Virginia*, 443 U.S. 307, 318-319 (1979); *Glasser* v. *United States*, 315 U.S. 60, 80 (1942). Therefore, a jury may convict a defendant, and the district court may properly uphold the conviction, even though the district court believed the defendant's testimony and would have acquitted the defendant if the case had been tried to the court. In that situation, the court would not impose the two-level obstruction of justice enhancement for false testimony at trial.

Similarly, there are situations in which a testifying defendant may be convicted even though the trier of fact does not believe that the defendant testified falsely. For example, a defendant may testify in support of a defense of entrapment or duress; the jury may believe his testimony but nonetheless reject his defense as factually insufficient. Or, a defendant may testify about the circumstances of the crime, hoping to persuade the jury that he was not sufficiently involved in the offense to be culpable. The jury may conclude that the defendant has testified truthfully, but be unpersuaded that he is legally innocent. Thus, the two-point enhancement for obstruction of justice would not automatically be imposed on any testifying defendant convicted at trial.

In any event, there is no constitutional flaw in a sentencing scheme that predictably enhances a defendant's sentence if he is found to have perjured himself at trial. While respondent chooses the pejora-

tive terms "wooden and reflexive," we believe that the terms "consistent and predictable" more accurately describe the operation of the obstruction of justice enhancement in Guidelines § 3C1.1, as applied to perjured testimony at trial. Perjury is a crime, and while a defendant is constitutionally entitled to testify in his own behalf, the Constitution provides no protection for perjury. The Sentencing Guidelines seek to construct a rational framework for sentencing, in which factors such as the commission of other crimes have a consistent and predictable effect on the defendant's sentence. There is no reason to treat the commission of the crime of perjury at trial in a fundamentally different way from the commission of a crime while the defendant is awaiting trial on the charges against him.

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

KENNETH W. STARR
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